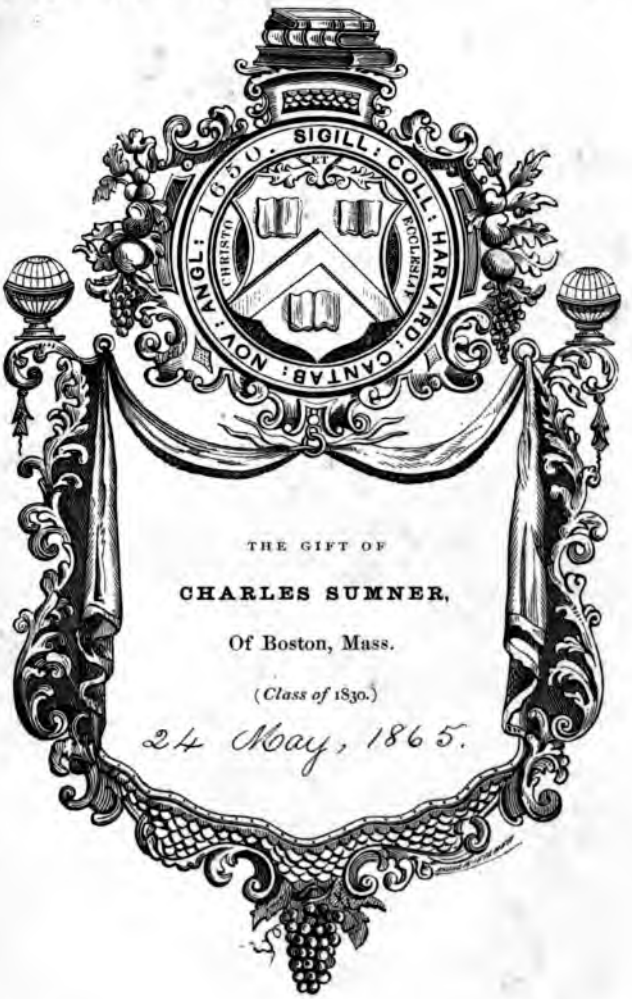

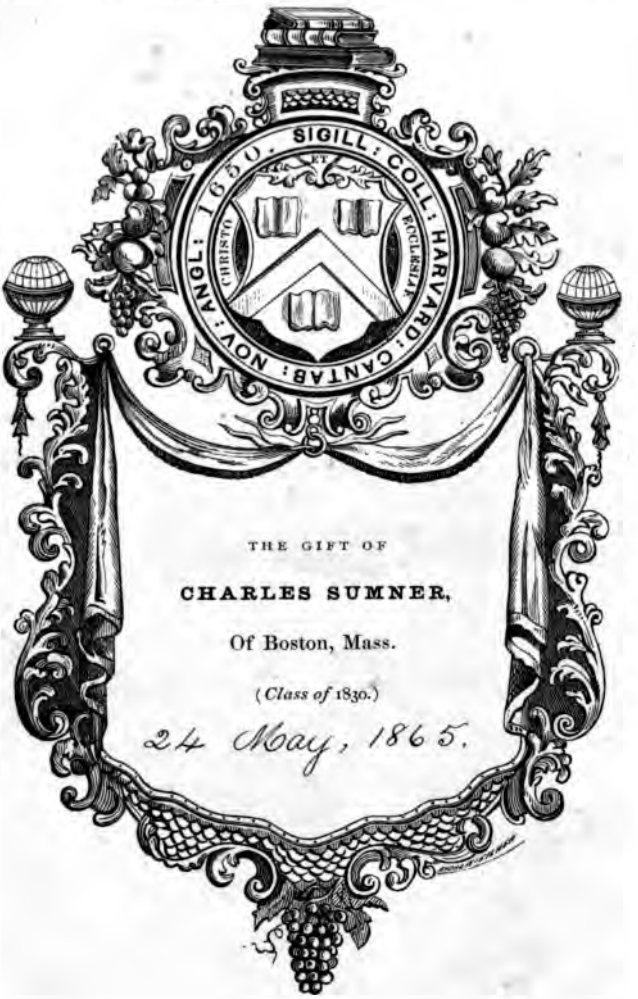

AN ARGUMENT

AGAINST

THE JURISDICTION

OF

MILITARY COMMISSIONS

TO TRY

CITIZENS OF THE UNITED STATES,

DELIVERED IN THE CASE OF WM. A. BOWLES, AND OTHERS, BY

HON. J. W. GORDON.

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JONATHAN W. GORDON'S

ARGUMENT ON THE JURISDICTION OF A

MILITARY COMMISSION

TO TRY CITIZENS OF A LOYAL STATE.

Mr. President and Gentlemen of the Commission:

I appear for Col. Bowles and Mr. Humphreys, who have directed me to discuss the question of your jurisdiction to try them. Before proceeding to this discussion, however, I may be pardoned for briefly referring to some preliminary considerations.

I will not deny that I am oppressed with the greatness and weight of the labor assigned me. Many circumstances conspire to make this day's work a burthen, while but few sources of external encouragement and support are to be found.

I meet at the threshhold of the solemn duty of this hour, the settled hostility of the Administration, the fierce and relentless spirit of the dominant party, and a strong tide of prejudice and passion created by a partizan press which, during this trial, has continually prejudged the questions to be discussed and decided here to-day. Nor, indeed, has this uncharitable work been confined to the press. Public speakers have caught up the testimony of witnesses even before their cross-examination; and, with such one sided, partial, broken fragments of the whole truth, have rushed eagerly into the popular arena, and proclaimed the guilt of the accused in every part of the State.

It is impossible that these facts should not have met your observation; and almost as impossible that you should not, (although you are all unconscious of their influence,) be more or less affected by them. They can not, indeed, have passed unobserved by you who have been at liberty and circulating freely among the people; for they have found their way even into the lonely cells of the prisoners, and made themselves manifest by the dim and dismal twilight of their dungeons. They are, indeed, everywhere. They have polluted the atmosphere, and infected the minds of the people. They are like the air around

and within us; and pass unheeded and unthought of, while they give color, direction and tone to all our thoughts and actions.

Nor, in regard to one of the accused, has it been sufficient for the purposes of those who have joined in this hue and cry, to confine their assaults upon him to the present time, or to the offences with which he now stands charged. They have gone back to the days of other years, and have dragged up and scattered over the land, old, and stale, and groundless imputations of delinquency originating in the time of the Mexican War. A record, made by interested men, for selfish and ambitious purposes, has been referred to, and old passions and prejudices invoked, upon a point whereon the people of Indiana are justly more sensitive than upon any other—the point of honor. But even that record does not assail his courage, his gallantry, or his patriotism; and, if it did, he might still proudly appeal from it to the testimony of his illustrious commander, Major General Zachary Taylor, under whose eye he fought on the glorious field of *Buena Vista*. To the report of that chieftain he appeals against the slanders born of subsequent and interested accounts of that contest; and prays that they may not be allowed to give a false and injurious coloring to the present accusation; and to the sentence which you are now about to pronounce.

I confess, however, that a still graver source of embarrassment to me, in the performance of my present duty, springs from the nature of the subject to be discussed—the importance of the principles to be defended. In view of these, the lives and fortunes of the accused—and, indeed, of us all—are as nothing. They and we are but mortal men. The worst that can possibly befall them at your hands, can, therefore, but anticipate, by a very few years, the common doom which time, or disease, or both together, will bring to them and to us all; for

"To every man upon this earth, death cometh soon or late."

It is not, then, merely because the lives and fortunes of the accused are suspended upon the result of this trial, that I confess myself embarrassed—overwhelmed at this moment, in the presence of the duty to which it calls me. That the lives, and fortunes, and good fame of the defendants are all involved in this cause, is, indeed, of itself, a fact of sufficient importance to touch very nearly any one whose heart is not dead to the gentle pleadings of pity and mercy; and weigh heavily upon him who in any, even the least degree, may divide the responsibility of an unfortunate result to either. I am not insensible to the weight of responsibility due, in that respect, to my relation to their cause. I am sure, however, that I should but ill represent their sentiments and wishes, if I allowed myself in this defence of their individual interests, wholly to lose sight of the consequences

which must follow to the cause of constitutional liberty in our country, by subjecting them to a military jurisdiction, to which, by the constitution and laws of the land, they are, in my judgment, clearly not amenable. The general consequences which must flow from such a precedent, give this trial an importance far above any private interests involved in it; and make my sense of responsibility painful in the extreme, for fear that "*the good old cause*" may suffer detriment through some default of mine.

But amid all these sources of discouragement and embarrassment,—and there are others which time will not permit me to notice,—I acknowledge with due thankfulness that there are not wanting some great encouragements and supports. Among these is the fact of publicity. These things are not done in a corner, nor under a bushel. They will be proclaimed from the house-top; and read and known of all men. They will be reconsidered and re-judged long after they shall have lost all their importance to us who are now engaged in them. What is right in them will be retained and appropriated by mankind to aid the great cause of civil liberty, and advancing civilization. What is wrong will just as certainly be condemned and rejected, as useless or hurtful to the same cause, by the same judgment. The record which we this day make up and complete will go to the tribunal of history—a tribunal where prejudice can not wound, nor slander kill. To all who earnestly strive to follow the path of truth and justice this day, the decisions of this tribunal can bring neither harm nor shame; for truth and justice are its eternal foundations.

Nor am I less encouraged and upheld by the voice of history. The labor assigned me will rest upon facts and precedents, handed down to us by the liberty loving race to which we belong. If these shall be regarded as of any auhority in this forum, then my labors shall not be in vain. Success shall crown them. The character of the members of this Commission, their habitual love of constitutional liberty, and of order maintained by law, do not permit me to doubt that they will carefully consider the great question of jurisdiction; and, indeed, all other questions properly before them, and render an honest finding and sentence according to the constitution and laws of the land. That constitution and those laws are but the organization of the facts and precedents transmitted to us with our blood, by our British ancestors. They are mingled with our very being; and permeate all the channels of our social and political life. To abandon them is to give up our social and political life—is to die. And, indeed, in this time of national sickness, when the public mind is suffering under a melancholy and morbid excitement, amounting almost to frenzy, it would be madness to give up the sure foundations of the constitution and laws, and the history

and customs of a thousand years upon which they rest, for an new fangled notion born of these evil times. It would be lik a man, amid the delirium of a fever, abandoning the busine and habits of a whole lifetime, for a new business and new hal its with which he had no acquaintance whatever. His friend would confine him in a straight jacket, and send him to Lunatic Asylum.

No, therefore, it must not be. The past is the only basi upon which to reconstruct the present—the constitution, o which it is possible reunite the belligerent members of this onc glorious, but now broken Union. But we, who are devoted t this great work of reconstruction, must not exhibit to all th world our utter disregard of its plainest provisions, and mos sacred principles. We must not throw down and destroy th fences, which it has built about the primordial rights of man kind; and then expect our enemies, or even our friends to be lieve us sincere in our professions of love for the constitution or desire to restore the Union; for, by such a course, we shal become scarcely less guilty of treason to our country, than reb els in arms against it. Indeed, the only distinction, in such case, would be that which separates *force* from *fraud;* and as between two such means to such an end, I am sure you will agree with me that force is by far the more noble and manly. But we stand opposed to both—we who stand for our country; and I am comforted to believe that you, have each offered your lives for its salvation from the dangers that assail it by force, will not hesitate to interpose your justice to save it from overthrow which may threaten it under the forms of law.

It is left for others to discuss the questions of guilt or innocence arising from the testimony in its application to the charges. I have nothing to do with it. Only so much of the evidence as tends to throw light on the question of jurisdiction falls to me; and I shall refer to the charges and spccifications in so far only as they may aid in the same general purpose. The argument I am to make would be just as valid if the guilt of the accused stood admitted, as if their innocence were established by the proof, beyond all question.

There are rights which belong to the guilty as well as to the guiltless; and among them is that of a fair constitutional and legal trial, and, all the legitimate consequences thereof. This right, among the ignorant and unthinking is often lost sight of, and sometimes disregarded. It is, nevertheless, as important as any other. Its denial is, therefore, a crime not only against the individual, but also against society at large. To destroy a murderer or a traitor by any other process than that prescribed by law, is as much murder as to kill the best man in the country. Dr. Francis Lieber has well presented this subject in his treatise on Political Ethics. He says:

"The State never ceases to protect; even the blackest criminal, the moment before his head falls, is protected. It was a most fallacious argument that, *frustra legis auxilium invocat qui legem committit*, from the *lex talionis*, or as St. John said before the Lords, when he brought in the bill of attainder against the earl of Srafford, (April 29, 1641,) "He that would not have others have a law, why should he have any himself?" Why should not that be done to him, that he himself would have done to others?" Even modern writers have endeavored to derive the punitory power of the State, from the fact that the offender, by doing wrong, declares himself out of the jural society. Nothing can be more untenable in all its bearings. On the contrary, the State being especially a jural society, can not possibly act except by law, and upon jural relations, and as far as the right of an individual is the condition of his union with other rational individuals, punishment is the right of the offender, however paradoxical this may sound at first, because we are accustomed to imagine under right, some specific privileges. State punishment is likewise the protection of the offender, who without it would be exposed to all, even the most extravagant, modes of private redress. No offender would hesitate to acknowledge and claim state punishment as his right, if the choice were left him, between state punishment, which, because it is state punishment, requires a formal trial on the one hand; and, on the other, those summary proceedings against criminals caught *flagrante delicto*, which we find perhaps in all early codes, and sometimes acknowledged to a very late period, (Blackstone, 4, 308,) or to which an excited people sometimes return, when the regular trial appears too slow for their inflamed passions, as has been the case in those riotous and illegal inflictions of death or other punishment, so unfortunately called lynch law in our country. I say unfortunately called lynch law, for it is ever to be deplored, if any illegal procedure receives a regular and separate name of its own. By this very application of a technical term, it assumes an air of systematized authority, which has an astonishing effect upon the multitude, and in fact, upon most men." Book 2, § 345.

It is this simple principle that makes it murder for any one to kill even a man condemned to death by a competent court, in a different manner, or at a different time or place than may have been fixed by the judgment. The law in this respect makes no difference between the lives of the guilty and the guiltless. Hence, when men seek to bring their enemies to justice and punishment by short and easy methods unknown to the law, and, therefore, in violation thereof, they but dig a pit into which themselves may, at any moment, fall and be lost. He who kills even a traitor in violation of law, kills at the same time the law itself.

Whatever may be your opinions, therefore, of the guilt or innocence of the accused, it can not effect the question of jurisdiction.

The next topic to which I desire to call your attention, arises from the language of the several specifications, and is particularly important for the purposes of this discussion in so far as it may apply to those embraced under the last charge, namely: "VIOLATION OF THE LAWS OF WAR." It is this: that the alleged offences were committed "within the military lines of the army of the United States, and the theatre of military operations."

Whatever may have been the purpose of the Judge Advocate in inserting this clause, it is clear to any lawyer that no jurisdiction can arise from it, when taken in connection with the fact that the accused are citizens of the State of Indiana, and of the United States; and that Indiana has always sustained a relation of loyalty to the Union and its Government. But even if there was no proof of citizenship of the accused, it has not been proven that the State of Indiana is either "within the military lines of the armies of the United States," or "the theater of military operations." Had the averment been that it was within the theater of war, it would have been well; for the whole country is the theater of war. But that can not be said of the lines of the army, or of the theater of military operations. There is no definition of "the lines of the army" that extends so far as is here claimed by the Judge Advocate; and all military writers which I have been able to examine define "the theater of operations," as follows, contradistinguishing it from the theater of war:

"*The theater of war* embraces not only the territory of the two belligerent powers, but also that of their allies, and of such secondary powers, as through fear or interest, may be drawn into the contest." * * * * * *

"*The theater of operations*, however, is of a more limited character and should not be confounded with the theater of war. In general, it includes only the territory which an army seeks, on the one hand, to defend, and on the other to invade." *Hallack's Elements of Military Art and Science*, p. 44; *Jomini's Art of War*, 74, 75.

I conclude, therefore, that "the theater of military operations," of a given army must be in front of the base of operations of that army. Thus, the base of operations of General Buell's army during the winter of 1861, and the succeeding spring, was the Ohio river; and his theater of operations, the whole country south of that base. And so of other armies. The base of our operations has generally been some line separating friendly from hostile territory; and hence, "the theater of operations," during this war, has generally been upon the enemy's soil. The sea-coast, I know, has frequently, during the present

war, become the base of our operations; but, then, the enemy's country was still, in every instance, the theater of those operations. It is useless, however, to discuss these public and notorious facts; for the citizenship of the accused, renders the attempt to make them responsible for a violation of the laws of war, wholly futile. Public enemies, only, are subject to the laws of war. The citizen, on the other hand, must answer for such acts as would, if committed by an enemy, be a transgression of the laws and usages of war, to his own government, according to its own laws. I will offer a single example, which I quote from the auto-biography of Lieutenant General Scott. It is as follows:

"In time of war all persons, *not* citizens of or owing allegiance to the United States of America, who shall be found *lurking*, as *spies*, in or about fortifications or encampments of the armies of the United States, or any of them shall suffer death according to the law and usage of nations, by sentence of a general court-martial."

"'Not citizens;' because, if citizens, and found 'lurking,' the crime would be that of treason—'adhering to [our] enemies, giving them aid and comfort;' and is so defined by the Constitution." Vol. 1, pp. 290, 291.

But what are "the laws of war?" To whom do they apply? The answer to these questions must forever put an end to all attempts to invoke the aid of those laws, and of the tribunals in which they are administered for the trial and punishment of one of our own citizens; for it must be remembered that "the laws of war" constitute that branch of international law which regulates the intercourse and conduct of belligerent persons, public enemies—with each other. It is this code that condemns spies, when taken, to an infamous punishment at the hands of their enemy. It is for cruel breaches of this code, that we are sometimes compelled, as a measure of self-defence, to resort to the cruel practice of retaliation. It is to this code we refer for authority to punish guerrillas. And so, I might go on until I had enumerated all its provisions; but I should not find one for the punishment of one of our own citizens among them all, unless it was established that he had first joined himself to, and become part of our acknowledged public adversaries. These laws of war are international—wholly international; and do not apply to the internal regulation of either one of two or more belligerent powers engaged in the same contest.

If, however, it shall be said that all persons, or the great body of them, engaged in the present contest on either side, are citizens of the United States; and, therefore, that a difficulty results in the application of this public code, to the parties, and that what character any citizen may sustain to either, may not always be clear, I grant it; but what follows? Can we give a

man a hostile character before he has openly espoused it? Can we strip him of the rights of citizenship, before he has acquired that relation to the enemy which will entitle him to the protection of this code, as well as subject him to its penalties, in case he violates it? There must be some general rule on the subject; and there can be no other or better one than to hold all persons resident in the States which have seceded and still remain out of the Union, as *prima facie* public enemies; and all those who have adhered, and still adhere, to the Constitution and Union, as *prima facie* citizens of, and subject to the laws and authority of the United States.

I know, indeed, that there are at least two States which have hitherto sustained an ambiguous relation to the struggle. I allude to Kentucky and Missouri. They have never seceded by solemn act; and still maintain their constitutional relation to the Federal Government. But, then, they are also represented in the Confederate Congress, and army. The character of a citizen of either, must therefore, depend upon his conduct; and he must be treated accordingly. If he has not joined the public enemy openly; but commits a crime against the government, he is entitled to be tried therefor by the ordinary courts of the Union, in pursuance of the Constitution and laws. If he has joined the public enemy and been taken in arms, or "*lurking* as a *spy*," he is entitled to be treated according to "the laws of war:" —in the former case to be exchanged as a prisoner of war, in the latter, to be hung for violating the laws of war. And this is just what our government has been doing during this rebellion.

The form of these charges places the Government then, in the following attitude toward the accused, namely: As claiming them as citizens on the one hand, but denying them the rights of citizenship, on the other: as fixing upon them, for the purposes of this trial, and the punishment and infamy that may follow it, the character of public enemies, on the one hand; but denying them any of the advantages resulting from that character, on the other. Such a course, I submit, is unheard of in the judicial proceedings of our country; and with all deference to my friend, the Judge Advocate, is, in my opinion wholly inadmissible. I have little apprehension, therefore, that you will claim jurisdiction of the accused on the ground that they are guilty of a violation of the laws of war; and, by consequence, public enemies. If you sustain your [redacted] at all, it must, therefore, be upon the basis of *martial law*.

I beg leave to call your attention to a fact, in evidence, which must exercise an important influence upon your judgment on the question: Whether *martial law* is, or has been, in force in the State of Indiana, or not? and, of course, upon that of your jurisdiction. I allude, of course, to the fact that the courts both of the State, and of the United States, within the State of In-

diana, have never at any time, during the present rebellion been thereby shut up, and the course of justice therein disturbed and stopped; but that those tribunals have all along remained open, and engaged in the administration of justice; and capable of enforcing their judgments, orders and decrees according to the established laws of the land. This fact was not proved in *Mr. Dodd's* case. His escape cut off all evidence in his defence; and, of course, this fact among others. Upon this fact, however, and a more thorough argument, I build my hopes of an ultimate decision against the jurisdiction. In pressing the argument and giving utterance to these hopes, I beg leave to say for myself, and for those whom I represent, that our objection to the jurisdiction, does not spring from any objection to the individual members of the court as fair minded and honorable gentlemen, and worthy to sit in judgment upon any man in the land, subject, under the constitution and laws, to their authority. It is on the other hand, simply because as citizens, in no wise connected with the military or naval service of the United States, the accused are not within any military jurisdiction whatever. They claim the right to be tried by one of the constitutional courts of their country, and by a jury thereof. They ask justice at the hands of their peers of the District of the State of Indiana. For justice is properly justice only when legal, constitutional, and just means, are employed in the attainment of legal, constitutional and just ends. Your findings may correspond precisely with what would be those of a jury of the country; but if you lack jurisdiction—the right to find at all in the premises—it would be a mockery to call them, or any subsequent proceedings thereon, justice. Justice must have a right origin, or it can not exist. If what is called justice proceed from a tribunal without authority, it is injustice, outrage, crime; and, if it reach the life of him who is made its subject, *it is murder.* 3 Co. Inst., p. 52; 1 Hale's His. P. C. p. 6, 499—501; 4 Bl. com. 178; and 4 State Trials, p. 129.

A good citizen will not accept even a favorable judgment at the hands of an unauthorized tribunal; much less an adverse one; because it involves the overthrow of the laws and government of his country, on which all rights, whether of person or property, depend. A good State, alive to a proper sense of its duty and dignity, will never allow him to accept the one, nor to be made the victim of the other.

Has this Commission, then, jurisdiction of this cause? May it rightfully, lawfully, constitutionally try the accused upon the charges and specifications exhibited against them? If it may, whence does it derive its authority for that purpose?

I am here to-day, to endeavor to answer these questions. You are here to-day, to judge whether I give the true response, or not. That you may "the better judge," I ask your attention, your candor, and your patience.

I do not believe that you will hold, as was maintained before you on a former occasion, that you are precluded from going into the question of jurisdiction by the mere order of the General convening this Commission, and that sending the accused before you "for trial." That I may not misrepresent the position taken by the learned Judge Advocate, upon this point, I beg leave to quote the entire paragraph. It is as follows:

"When General Hovey convened this Commission within the limits of his jurisdiction, and committed the case of Harrison H. Dodd, the accused, to this Commission to try it, by virtue of his military power, acting under the authority that was given to him by the Commander-in-chief of the army, namely: the President of the United States, he suspended the civil law, and put in operation the military, or *martial law*. The officers of this Commission could not under the oath that they have taken, refuse to obey the orders of the officers placed over them. They could not stop and go back of that order, and refuse to hear and determine this case."

Now, whatever may have been your decision in that case upon the question of jurisdiction, I am very certain that you did not adopt the doctrine of this paragraph. I know you do not, and can not hold to the slavish and shameful notion, that you sit here to do whatever the commanding General may order. Obedience of the inferior to the superior is for the field, the march, the camp, the desk; and even there it has its limits. The law does not require obedience anywhere in contravention of its own provisions. You are sworn to obey the "lawful" commands of your superiors; and there your obligation ceases. The employment of the word "lawful," (Art. War Sec. 9,) clearly excludes the idea of obedience to all but such commands. The unlawful order of a superior, even the highest, can not be given in evidence in justification of a trespass—much less of a felony. Can obedience then extend to the duties of the court room, and subordinate the justice which, in your judicial capacity, you are to administer there? If it does, what a mockery is all military justice! Who would, or could consent to sit as a member of a military court, and pass judgment upon the lives and fortunes of his fellow-men, when his own convictions of the law and the facts, in the case, were to have no control over his decisions!

"I had sooner be a dog and bay the moon."

Held on such terms, your commissions would be but badges of the most odious and wicked servitude. Every free mind that has not quite escaped the direction of conscience, must reject such a position with indignation and horror! I think I hear you exclaiming at such a proposal: "No; let the General go directly to his purposes, and punish whom he will, and as he will,

without the deceitful and wicked pretence of a trial. I will brave all consequences sooner than thus surrender my manhood. He shall never employ me in a mockery so foul, and so cruel!" Every honorable mind would so feel and so speak; and none, I am sure, more promptly and warmly than my distinguished friend, the General, who now commands this District; and under whose authority you sit. For, if it is all a matter of command and obedience, then let the command and its execution stand together, without the intervention of this hollow form of justice. Do not mock the predestined victims with the delusive hopes arising from the forms of a trial, that, from first to last, on this theory, can not rise higher than a miserable trick to deceive the looker on; and divide the responsibility of acts not capable of justification, when placed before the world in their true light. Indeed, on such a theory, you do not constitute a court at all, in any received sense of the term; for "a court is a place where justice is judicially administered."

With these observations I shall deliver this topic to your consideration and judgment.

I am thus brought at last to the discussion of *martial law*, as the basis; and, indeed, the only basis on which your jurisdiction of the present cause can possibly be sustained. If *martial law* does, in fact, exist in the State of Indiana, you may have jurisdiction. If it does not, you do not, and can not possibly possess such jurisdiction. The question, therefore, recurs upon us:

Has *martial law* an actual existence in the State of Indiana to-day? If so, how has it received such existence? Does it exist by proclamation, by law, or by necessity? If by proclamation, or law, when was the proclamation made, or the law passed? If by necessity, when did that necessity arise; and wherein does it consist?

As the first step toward a satisfactory answer to these questions, let us determine what *martial law* really is; for this is still a question. This question I propose to answer from the books. Smith says:

"*Martial law* is the law of war, that depends on the just, but arbitrary power of the King or his lieutenant; for though the King doth not make any law but by common consent in Parliament, yet in time of war, by reason of the necessity of it, to guard against dangers that often arise, he useth absolute power, so that his word is law." *Smith on the English Republic*, book 2, chap. 4.

Sir Matthew Hale, in his History of the Common Law, says:

"*Martial law* is not in truth and reality a law, but something indulged rather than allowed as a law; the necessity of government, order, and discipline in an army is that only which gives these laws any countenance." 1 *His. C. L.*, p. 54.

I make this quotation, not because, in the present state of opinion and law, either in England or America, it gives us a very precise and accurate notion of *martial law;* but in order to bring it into relation to a criticism which, when taken in connection with the state of British military law at the time the venerable Hale wrote, is, in my opinion, entirely unjust; and, to show that, at that time, this definition was as accurate and complete as could be given. The criticism to which I refer is that of the late Attorney General Cushing. He says:

"This proposition is a mere composite blunder, a total misapprehension of the matter. It confounds *martial law* and *military law;* it ascribes to the former the uses of the latter; it erroneously assumes that the government of a body of troops is a *necessity*, more than that of a body of civilians, or citizens. It confounds and confuses all the relations of the subject, and is an apt illustration of the incompleteness of the notions of the common-law jurists of England in regard to matters not comprehended in that limited branch of legal science." 8 *Opinions of the Att'ys Gen.* 365, *et seq.*

Now, I beg leave to say, that Sir Matthew Hale was not a mere common-law lawyer. His writings show him to have been familiar with the civil law; and to have read extensively the continental writers on public law. Nor is it true that his observations on the nature and uses of *martial law* constitute a mere "composite blunder," "a total misapprension of the question." The "blunder," on the contrary, is on the part of the learned Attorney General; and not on that of the venerable Chief Justice. It will be apparent that I am right, if we refer to the state of England and English military law at the time the History of the Common Law was written. Its author died in 1676. Up to that time, England had properly no military code. Her armies were really subject to such laws as the King might impose, where a limit upon his will in this respect had not been fixed by Parliament. It was not until after Hale wrote, and had been gathered to his fathers, that the first ~~military~~ mutiny bill was passed, and military law thereby placed upon a different footing from that of *martial law.* The will of the King, until then, was the law of the army—a will regulated, indeed, by the principles of the civil law; but, even in that respect, controlled no further than he chose; and this will is the same whether applied to soldiers or civilians. "It is not in truth and reality a law." It was, nevertheless, pretty much all the law known to the British army in the time of Hale. 1 Bl. Com., chap. 13; 2 Sullivan's Lectures, p. 257. In this view of the facts of history, and the state of military law when Hale wrote, the learned Attorney General seems to be guilty of the blunder which he attributes to the Chief Justice.

The first member of Mr. Stephens' definitions of *martial law* is sufficiently accurate. He says:

"*Martial law* may be defined as the law, (whatever it may be,) which is imposed by military power." 2 Com. Laws of England, p. 561.

The Duke of Wellington was also right when he defined it thus:

"*Martial law* is neither more nor less than the will of the General who commands the army." Hansard's Debates, (3d series,) vol. 115, p. 880.

And again, when he wrote as follows:

"Military law," [i. e. *martial law*,] "as applied to any persons excepting officers, soldiers, and followers of the army, for whose government there are particular provisions of law, in all well regulated countries, is neither more nor less than *the will of the General of the army.*" Despatches, vol. 6, p. 43.

The distinction between *martial* and *military* law is, in this last definition, made plain, the latter being confined to provisions of law for the regulation of the army; and the former, to such as the will of the General may impose upon those—not soldiers—under *martial law.*

Earl Grey, in discussing the questions growing out of a declaration of *martial law* in Ceylon again expresses the idea with sufficient accuracy. He says:

"What is called proclaiming *martial law* is no law at all; but merely for the sake of public safety, in circumstances of great emergency, *setting aside all law and acting under military power;* a proceeding which requires to be followed up by an act of indemnity when the disturbances are at an end." Hough's Prec. in Mil. Law, p. 515.

Judge-Advocate-General Dundas, in writing upon the subject, says:

"*Martial law* is not a written law; it arises on a necessity to be judged of by the *Executive,* and ceases the instant it can possibly be allowed to cease. *Military law* has to do only with the land forces of the Crown, mentioned in the second section of the mutiny act. *Martial law comprises all persons, all are under it,* whether they be civil or military." Second Rep. on Ceylon, Hough, *supra,* p. 535.

"When *martial law* is proclaimed," says Hough, "courts-martial are thereby vested with such a summary proceeding, that neither time, place nor persons are considered. Necessity is the only rule of conduct; nor are the punishments which courts-martial may inflict under such authority limited to" such as are prescribed by law. Hough on Courts-Martial, p. 383.

Captain Benet, in his treatise on Military Law and Courts-Martials, in speaking of *martial law,* says:

"*Martial law,* then, is that military rule and authority which exist in time of war, and is conferred by the laws of war, in relation to persons and things, under and *within the scope of ac-*

tive military operations in carrying on the war, and which extinguishes or suspends civil rights, and the remedies founded upon them for the time being, so far as it may appear to be necessary, in order to the full accomplishment of the purpose of the war, the party exercising it being liable in an action for any abuse of the authority thus conferred. It is the application of military government—the government of force—to persons and property within the scope of it, according to the laws and usages of war, to the exclusion of municipal goverment, in all respects where the latter would impair the efficiency of military law, or military action." Benet on Mil. Law and Courts-Martial, p. 14.

The late commander-in-chief of the army of the United States, Major General Halleck, observes:

"We remark, in conclusion, that the right to declare, apply and exercise *martial law* is one of the rights of sovereignty, and is as essential to the existence of a State, as is the right to declare or carry on war. It is one of the incidents of war, and, like the power to take human life in battle, results directly and immediately from the fact that war legally exists. It is a power inherent in every government, and must be regarded and recognized by all other governments; but the question of the authority of any particular functionary to exercise this power is a matter to be determined by local, and not by international law. Like a declaration of seige, or blockade, the power of the officer who makes it, is to be presumed until disavowed; and neutrals who attempt, in derogation of that authority, do so at their peril." International Law and Laws of War, p. 380.

Again, he says:

"The English common law authorities generally confound *martial* with *military* law; and, consequently throw very little light upon the subject, considered as a domestic fact; and in parliamentary debates it has usually been discussed as a *fact*, rather than as forming any part of their system of jurisprudence. Nevertheless, there are numerous instances in which *martial law* has been declared and enforced, in time of rebellion or insurrection, not only in India, and British Colonial Possessions, but also in England and Ireland. It seems that no act of Parliament is required to precede such declaration, although it is usually followed by an act of indemnity, when the disturbances which called it forth are at an end, *in order to give constitutional existence to the fact of martial law.*" *Id.* 374.

I desire to remark, in passing, that a careful study of the English authorities alluded to, will, perhaps, explain them, and show that their confusion is only apparent, in relation to this subject. In the first place, as already shown, the English had no distinct system of *military law* until after the revolution of 1688; and before that time their armies were subject, in a great degree, to simple *martial law*. It is true the Kings' *will* was in

some measure restrained by statute. In the second, as the only ground upon which that *will—martial law*—can apply to others than soldiers *within* the kingdom, is that of *necessity*, it was both natural and philosophical for them to regard it as simply a fact. Indeed, it is nothing else but a fact both in its origin and its application. It originates in necessity, which is a fact. It is the will of the commanding general, who always determines its extent and the mode of its application. It will thus assume a different form—will be more or less sweeping—cruel or merciful, according to the exigency of each particular instance of its exercise, as well as the character and temper of him who administers it. A thing thus variant and uncertain can not be allowed as a law; for a law must be a rule prescribed, must be uniform in its application, which can never be said of any thing resulting from mere necessity, and subject for its measure and duration to mere human will. The only element common to such a state of administration and law, is that both are applied to the affairs of men. It will, therefore, be subject, of course, to the judgment of public opinion as all other facts are, in which moral agents and relations are involved; but whatever restraint that imposes can not change the fact into a law. Nor, it would seem, does the right of a belligerent depend upon the legality of the war, as remarked by General Halleck. On the contrary, we might naturally suppose that he who entered upon an illegal and unjust war, would be most likely to avail himself first of the advantages of *martial law*, which, in the language of Mr. Adams, would "sweep the laws of his adversary by the board," and substitute his discretion therefor. Hence, upon the whole, I see no reason why the learned general should criticise the English. The last two authors cited, seemingly without perceiving it, confine the operation of *martial law* to the territory of public enemies, or to the immediate theater of military operations. In either view, their remarks are inapplicable to our condition here; for we may admit the most unbounded authority to exercise *martial law* in our generals, in carrying on a foreign war in an enemy's country; or in a domestic war "*within the scope of active military operations*," and it will not follow that any such authority can exist in a State devoted to the government, and in no sense the theater of "*active military operations*." In the foreign country the citizen will be subject to international law; and our public enemy can not look beyond that to see whether, in the exercise of *martial law*, we disregard our own constitution. At home, the fact of war and the immediate presence of hostile armies puts an end to all other laws; and *martial law*, for the time being, exists by necessity. Military power is rather, in such case, a law to itself. They leave us, therefore, in quite as much doubt and confusion, so far as the case in hand is concerned, as they found us.

I beg your pardon for introducing here, a little out of place, the observations upon martial law of some of our own leading politicians. I say politicians advisedly; for I do not think that they were generally actuated in the utterance of these opinions by the motives that should govern statesmen; and I do not think so, because the whole spirit of the debates in which they were delivered, was of a most decided and even bitter partizan tone. I allude to the debates on remitting the fine imposed by Judge Hall upon General Jackson, at New Orleans, in 1815, for contempt of court in refusing obedience to a writ of *habeas corpus*. Democrats in Congress were in favor of the measure, while most, if not all the Whigs, were opposed to it. Mr. John Q. Adams, then in the House of Representatives, made it an occasion for striking at both the Democratic party and slavery. He maintianed that the measure was a hobby on which leading Democrats were seeking to elevate themselves to the Presidency upon General Jackson's popularity; and then turned upon the slaveholders of the South, and reminded them how easy it would be, in some fit emergency, to employ *martial law* for the abolition of slavery. And such generally was the spirit of the debate; a spirit, one would think, little calculated to render opinions remarkable for their legal accuracy. It was in this debate that Mr. Adams said:

"The power of Congress"—the power to declare martial law—"has, perhaps, never been called into exercise under the present constitution. But when the laws of war are in force, what, I ask, is one of those laws? It is this: *that when a country is invaded, and two hostile armies are met in martial array*, the commanders of both armies have power to emancipate all the slaves in the invaded territory.

"And here I recur again to the example of General Jackson. What are you about in Congress? You are about passing a law to refund to General Jackson, the amount of a certain fine imposed upon him by a judge under the laws of Louisiana. You are going to refund him the money with interest, and this you are going to do, because the imposition of the fine was unjust. And why was it unjust? Because General Jackson was acting the under laws of war; and because the moment you place a military commander in a district that is the theater of war, the laws of war apply to that place.

"I might furnish a thousand proofs to show that the pretensions of the gentlemen to the sanctity of their municipal institutions, under a state of actual invasion, and actual war, whether servile, civil, or foreign, is wholly unfounded, and that the laws of war do in all such cases take precedence. I lay this down as the law of nations. I say, the military authority takes, for the time, the place of all municipal institutions, and of slavery among the rest; and that, under that state of things, so far from

its being true, that the States where slavery exists have the exclusive management of the subject, not only the President of the United States, but the commander of the army, has power to order the universal emancipation of the slaves. I have given here more in detail a principle which I have asserted on this floor before now; and of which I have no more doubt than that you, sir, occupy that chair."

In the course of the same debates, Mr. Buchanan, taking it for granted that General Jackson had done no more than his duty in declaring *martial law* in New Orleans, in 1814 and 1815, said:

"If General Jackson did no more than his duty in declaring *martial law*, the moment that declaration was made, the official functions of Judge Hall ceased, with regard to his power of issuing writs of *habeas corpus*, which might interfere with the defence of the city. As soon as *martial law* was in force every citizen of New Orleans, whether sustaining an official character or not, was bound to submit to it. * * * * * * * * For it was quite a plain case, that, if *martial law* did not supercede and put in abeyance the civil power, it would be wholly insufficient in attaining the only objects for which alone it could be tolerated or justified."

Mr. Douglas, in the House of Representatives, maintained the same principles; but from his statement of the case confined their operation to the defence of the city; in other words, to a state of siege. Among other things he said:

"I maintain that, in the exercise of the power of proclaiming *martial law*, General Jackson did not violate the constitution, nor assume to himself any authority not fully authorized and legalized by his position, his duty and the necessity of the case. General Jackson was the agent of the government, legally and constitutionally authorized to defend the city of New Orleans. It was his duty to do this at all hazards. It was then conceded, and is now conceded, that nothing but *martial law* would enable him to perform that duty. His power was commensurate with his duty, and he was authorized to use the means essential to its performance. This principal has been recognized and acted upon by all civilized nations, and is familiar to all who are conversant with military history. *It does not imply the right to suspend the laws and civil tribunals at pleasure. The right grows out of the necessity.* The principle is that the commanding General may go as far, and no farther than is absolutely necessary to the defence of the place committed to his protection. There are exigencies in the history of nations, when necessity becomes the paramount law, to which all other considerations must yield. If it becomes necessary to blow up a fort, it is right to do it. If it is necessary to sink a ship, it is right to sink it. If it is necessary to burn a city, it is right to burn it." *Life and Speeches of Senator Douglas*, pp. 25, 26.

And so I might go on, adding opinions and definitions of *martial law* to endless extent. I will quote but one more; and that is the opinion of Attorney General Cushing already referred to. He says:

"*Martial law*, as exercised in any country by the commander of a foreign army, is an element of the *jus belli*. It is incidental to a state of solemn war, and appertains to the law of nations. The commander of the invading, occupying, or conquering army, rules the invaded, occupied, or conquered foreign country, with supreme power, limited only by international law, and the orders of the sovereign or government he serves or represents. For by the law of nations, the *occupatio bellica*, in a just war, transfers the sovereign power of the enemy's country to the conqueror. (*Wolff's Jus. Gentium*, § 255; *Grotius, De Jure et Pacis, ed. Cocceii*, lib. iii, cap. 8.)

Such occupation by right of war is, *so long as it is military only*, that is *flagrante bello*, will be the case put by the Duke of Wellington, of all the powers of the government resumed in the hands of the commander-in-chief. If any local authority continue to exist, it will be with his permission only, and with the power to do nothing, except what in his plenary discretion, or his own sovereign, through him, shall see fit to authorize. The law of the land will have ceased to possess any proper vigor.

Thus, while the armies of the United States occupied different provinces of the Mexican Republic, the respective commanders were not limited in authority by any local law. They allowed, or rather required, the magistrates of the country, municipal or judicial, to continue to administer the laws of the country among their own countrymen, but in subjection always to the miltary power, which acted summarily and according to discretion, when the belligerent interests of the conqueror required it, and which exercised jurisdiction either summarily, or by means of military commissions, *for the protection or punishment of citizens of the United States in Mexico.*

That, it would seem, was one of the forms of *martial law.* A violent state of things, to cease, of course, when hostilities should cease, and military occupation be changed into political occupation." (*Elphinstone* v. *Bedruchund*, 1 Knapp's Rep. p. 338; *Cross* v. *Harrison*, 16 How. p. 164.)

If we now return, and endeavor to glean from all these authorities and opinions, an idea of *martial law*, as applicable to the internal affairs of a State, we shall find ourselves scarcely nearer to it than we were at the start. *The laws of war* regulate a state of war, and define the rights of parties to it, with respect to each other; and can only afford, therefore, a remote analogy for our guidance in the internal concerns of a State in which riots or rebellions call into requisition the military power. True, when a civil war assumes the magnitude of our present

contest, and the parties thereto—rebels on the one side and government on the other—from the necessity of the case, as well as from considerations of humanity, are compelled to adopt the public law of war, and to regulate their conduct according to its principles, the laws of war become, to that extent, a sufficient guide. But all this does not in the least help us, in regard to those States which have never been engaged against the government. Whether any, and if any, what assertion of military power, incompatible with civil institutions and civil rights, is admissible in those States, does not appear from the books that treat of *martial law*. Earl Gray seems to approach the point more nearly than the rest; for in such case *martial law* would "*in truth and fact be no law at all; but the setting aside of all law and acting under military power.*" *Supra.* And this he says can only be done "in circumstances of great emergency," and must be followed "by an act of indemnity." It is, therefore, the substitution of military force for, and to the exclusion of, the laws; and can be justified no further than is absolutely necessary. And all the authorities and opinions cited go to this extent, and no further.

Has this substitution, then, of military power for civil law, and civil tribunals and institutions taken place in Indiana? And if so, upon what necessity? When was it done? Who determined the necessity, and made the substitution? Where is the act of Congress, the proclamation of the President, or the order of the military commander of the department, or the district? Have these, or has any of them acted upon this subject; and, if so, to what extent? And above, and before all, where is the grant of authority to any, or all of them combined, or, indeed, to the whole government, thus to "set aside all law," and substitute "military power" therefor? To assume that any such authority can exist in a limited government is a self-contradiction.

Let us examine briefly the nature of the Anglican system of civil liberty—institutional government—a system which in a very large measure we have inherited or adopted; and see whether such a system as *martial law* is at all compatible therewith. Can the two exist together?

I shall endeavor to answer this question by a brief review of English history and law; for if this power "to set aside all law," and to "act under military power," be at all consistent with such a system of law and government, we shall thus be able to determine in what emergencies and to what extent.

I enter the more cheerfully upon this review, because it will enable me to correct my friend, the Judge Advocate, in an assertion which he has frequently made during the progress of these trials, namely: "*We are making new precedents daily.*" Now, I think, I shall be able to show him that we are following old and bad precedents—the work of wicked and lawless princes

in evil times—which were condemned, disallowed, and reversed by better princes immediately upon the return of better times; and which are only not known to him, because they have so long remained dead and buried among the rubbish of barbarous ages, that he has not been able, or, at least, has not chosen to dig them up for his own, and your guidance on this occasion. I shall aid him in this respect; and, while I do so, must beg his pardon, and that of the government he represents, for dispelling the illusion that either is entitled to patent a new precedent. In this regard they will find, after all, and, indeed, they should have known from the first, that the farther back they go in the history of the past, the more precedents they will find for the easy but ruinous substitution of *force* for *law*. Wherever a free people have lost their liberties, there will be found a precedent in point. The history of Greece and Rome is fruitful of such precedents. Solomon had wiser conceptions of the methods by which history continually repeats itself, than to speak of new precedents; and the sum of wisdom on this point, as in his day, still remains happily expressed in these words: "There is no new thing under the sun."

I will not go back in the history of English law beyond *Magna Charta;* for that "solemn instrument" has been justly regarded as laying the imperishable foundations of the great political institutions of that country. (Creasy on the English Constitution, 3.) Ours, in America, rest on the same foundations —are referable to the same origin.

The 29th chapter of that instrument, as given by Henry 3, contains these provisions which have found a place in all our American Constitutions:

"*Nullus liber homo capiatur, vel imprisonetur, aut disseisietur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis, aut utlagatur, aut exuletur, aut aliquo modo distruatur, nec super eum ibimus, nec super eum mittimus, nisi per legale judicium pariurn suorum, vel per legem terræ.*" 2 Coke's Inst., p. 45. Which has been rendered as follows:

"No freeman shall be taken, or imprisoned, or disseised, or outlawed, or exiled, or banished, or in any ways destroyed; nor will we pass upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land." *Creasy, Supra, p.* 134.

"These are," as Mr. Creasy observes "all words that should be carefully read over, and over, and again; for, as Lord Coke quaintly observes, in his comments on them; 'as the gold-finer will not out of the dust, threds, or shreds of gold let passe the least crum,' in respect of the excellency of the metal; so ought not the learned reader to passe any syllable of this law, in respect of the excellency of the matter'" *Id.*, 135; *and* 2 *Inst.* 57.

Lord Coke in commenting upon the words: "No man destroyed," &c., gives the following commentary and illustration:

"That is, forejudged of life, or limb, disherited, or put to torture or death." * * * * * *

"Thomas, Earl of Lancaster, was destroyed, that is, adjudged to die as a traitor, and put to death, in 14 E. 2, and a record thereof made; and Henry, Earl of Lancaster, his brother and heir, was restored for two principal errors against the same Thomas, Earl: 1. *Quod non fuit araniatus, et ad responsionem positus tempore pacis, eo quod cancellaria et aliæ curiæ Regis fuer, apertæ, in quibus lex fiebat unicuique prout fieri consuevit:* that is to say: Because he was not arraigned, and because in time of peace, he was put to trial while the Chancery and other courts of the King were open, in each of which the law was regularly administered; 2. *Quod contra cartam de libertatibus, cum dictus Thomas fuit unus parium et magnatum regni, in qua continetur*— and reciteth this chapter of *Magna Charta* and specially *quod Dominus Lex non super eum ibit; nec mittet; nisi per legale judicium parium suorum, contra legem, et contra tenorum Magna Charta;* that is, because it was against the charter of liberties, since the said Thomas was one of the peers and magnates of the realm in which it is preserved; and reciteth this chapter of *Magna Charta*, and specially "because the Lord the King will not proceed against any one, nor send upon him unless by the legal judgment of his peers. Nevertheless, by the aforesaid proceeding, in time of peace, without arraignment, or pleading, or the legal judgment of his peers, against law, and the terms of *Magna Charta*, he was put to death. More examples of this kind might be found." *Id., supra.*

This case, when the mode of trial is shown, is the reversal of a precedent which the Judge-Advocate would, perhaps, style "a new precedent;" for the historian tells us that Thomas of Lancaster was adjudged to death by a kind of military court, extemporized by the King, and consisting of himself and a few Earls and Barons. 2 Lingard His. Eng., p. 248, and note; 2 Hume His. of Eng., pp. 159, 160.

The learned Coke adds, immediately after citing this case, and its reversal—

"Every oppression against law, by color of any usurped authority, is a kind of destruction; for *Quando aliquid prohibitur, prohibiter et omne, per quod devenitur ad illud;* and it is the most grievous oppression that is done by color of justice." *Id., sup.*

The reversal of a second precedent that might be regarded as new, is recited by Sir Matthew Hale in his History of the Common Law; and is thus given:

"The exercise of *martial law*, whereby any person should lose his life, or member, or liberty, may not be permitted in time of peace, when the King's Courts are open for all persons to receive

justice according to the laws of the land. This is in substance declared by the Petition of Right, 3 Car. 1, whereby such commissions and *martial law* were repealed and declared contrary to law. And accordingly was that famous case of Edmund, Earl of Kent, who being taken at Pomfret, 15 Edw. 2, the King and divers lords proceeded to give sentence of death against him, as in a kind of military court, by a summary proceeding, which judgment was afterwards, in 1 Edw. 3, reversed in Parliament. And the reason of that reversal serving to the purpose in hand, I shall here insert it as entered in the record, viz: '*Quod cum quicunq; homo ligeus domini regis pro seditionibus, &c., tempore pacis captus et in quacunque curia domini regis ductus fuerit de ejusmodi seditionibus et aliis feloniis sibi impositis per legem et consuetudine regni arrectari debet et responsionem adduci, et inde per communem legem antequam fuerit morti adjudicand' (triari) &c. Unde cum notorium sit et manifestum quod totum tempus quo impositum fuit eidem comiti propter mala et facinora fecisse, ad tempus in quo captus fuit et in quo morti adjudicatus fuit, fuit tempus pacis maximæ, cum per totum tempus prædictum et cancellaria et aliæ plac. curiæ domini regis apertæ fuer. in quibus cuilibet lex fiebatur sicut fieri consuevit, nec idem dominis rex unquam tempore illo cum vexillis explicatis equitabat, &c.*" Which record may be rendered thus:

"Whenever the subject of the Lord the King, shall be arrested for sedition in time of peace, before he can be adjudged to death according to the common law, he must be taken into some court of the King and held to answer for such seditions and other felonies; whence it follows, that when it is made known and manifest, that all the time during which it is alleged that the crimes were done, on account of which he was arrested, to the time in which he was taken and adjudged to death, was a time of profound peace, and during all the time aforesaid, the Chancery and other courts of the King were open in which any law could be executed as it was the custom to have done, the same Lord the King had no power, during that time, to exercise military control.

"And accordingly the judgment was reversed; for *martial law*, which is rather indulged than allowed, and *that only in case of necessity*, in time of open war, *is not permitted in time of peace when the ordinary courts of justice are open.*" 1 His. C. L. pp.55, 56.

In order that these precedents may have their due weight in this case, I beg leave to give a legal definition of what is, in this respect, held to be a time of peace in England, according to the common law. I will quote the precise language of Lord Coke, who says:

"*When the courts of justice are open*, and the judges and ministers of the same, may by law protect men from oppression and violence, and distribute justice to all, *it is said to be a time of peace.* So, when by invasion, insurrection, or rebellion, &c., *the peaceable*

course of justice is stopped, so as the courts of justice be as it were shut up, then it is said to be time of war." Coke upon Littleton, 249, b. n. 1.

In further commenting upon the great chapter of *Magna Charta*, already quoted, Lord Coke says:

"'By the judgment of his peers' are to be understood of the King's suit"—in other words, of a State prosecution. "And it extendeth to the King's suit in case of treason or felony, or misprision of treason or felony, or being accessory to a felony before or after, and not to any other inferior offense. Also, it extendeth to the trial where he is to be convicted." 2 Inst., 49.

And upon the word, "*legale*," he says:

"By the word *legale*, amongst others, three things are implied; 1st. That the manner of trial was by law before this statute; 2d. That their verdict must be legally given, wherein principally it is to be observed; 1st. That the lords ought to hear no evidence but in the presence and hearing of the prisoner; 2d. After the lords have gone together to consider of the evidence, they can not send to the High Steward to ask the judges any question of law, but in the hearing of the prisoner," &c.; 3d. "When all the evidence is given," &c., "the High Steward can not collect the evidence against the prisoner, or in any sort confer with the lords, touching their evidence, in the absence of the prisoner," &c. 2 Inst., 49.

And again, upon the word, "by the law of the land," while, perhaps, going to the extent of permitting a party suspected of treason to be arrested without writ, upon suspicion and common fame, he totally excludes the notion of his continued imprisonment without some warrant; and leaves out of the question all other forms of trial, but that by the legal judgment of his peers. *Id.* pp. 50, 55.

After the close of the long and glorious reign of Edward the Third, his unworthy grandson, Richard the Second, came to the throne, which he finally lost, by attempting to return to such precedents as those just cited of his great grandfather. His efforts to get rid of *Magna Charta* and the Common Law, and to substitute the Roman Civil Law for them, may be learned from the records of his reign. An outline sufficient for our purpose will be found in Sullivan's Lectures on the Laws and Constitution of England. (See, vol. 1, p. 318, *et seq.;* and vol. 2, 257.) In the former place will be seen what great efforts he made to introduce the Civil Law, and in the latter, that this law became the law of the Marshal's Court;—no doubt on account of the fondness of the kings therefor,—and also, that the jurisdiction of that court embraced the administration of *martial law* over soldiers and camp followers.

In subsequent reigns, the kings of England struggled almost constantly to extend this jurisdiction to others than soldiers;

but it was a struggle against the free spirit of the nation. In the reign of Henry the Eighth, an instrument was placed in the hands of that monarch, by the parliament, which seemed to go far toward making the king absolute; and which was subsequently used by him and his successors in such a way as almost to insure that end. This was done by the passage of a statute "which," as Lord Coke observes, "gives more power to the king than he had before;" and yet even there it is declared that he can not "alter the law, statutes or customs of the realm, or impeach any in his inheritance, goods, body, life, &c." The father of that King had gone so far, prior to this act, as to claim the right to control the subject's right of doing all things not unlawful; (Hallam's Constitutional History, p. 15;) and his daughter, Queen Elizabeth, carried the power under this act to such an extent as to set all law at defiance. "One Peter Burchill, a fanatical Puritan, and, perhaps, insane, conceiving that Sir Christopher Hatton was an enemy to the true religion, determined to assassinate him; but by mistake, he wounded instead a famous seaman, Captain Hawkins. For this ordinary crime, the Queen could hardly be prevented from directing him to be tried instantly by *martial law*. Her council, however, (and this it is important to observe,) resisted this illegal proposition with spirit and success." (Hallam Cons. His., 143.) "The Queen had been told, it seems, of what had been done in Wyatt's business—a case not at all parallel; though there was no sufficient necessity, even in that instance, to justify the proceeding by *martial law*. But bad precedents always beget *progenium vitiosiorem*." (*Id.*, in note.) But the same learned authority gives the following instances of the exercise by Queen Elizabeth, of a power almost absolute, through proclamations. I quote:

"We have, indeed, a proclamation some years afterward, declaring that such as brought into the kingdom, dispersed papal bulls, or traitorous libels against the queen, should with all severity, be proceeded against by her majesty's lieutenants, or their deputies, by *martial law*, and suffer such pains and penalties as they should inflict; and that none of her said lieutenants, or their deputies, be in any wise impeached in body, lands, or goods, at any time hereafter, for anything to be done or executed in the punishment of any such offender, according to the said *martial law*, and the tenor of this proclamation, any law, or statute to the contrary, notwithstanding." This, Mr. Hallam regards as "by no means constitutional;" but apologises for it, because it was done "when, within a few days, the vast armament of Spain"—known in history as the Spanish Armada—"might effect a landing on the coast." "But," he remarks further, "it is an unhappy consequence of all deviations from the even course of law, that the forced acts of overruling necessity,

come to be distorted into precedents, to serve the purposes of arbitrary power." *Id.*, 143; 4 Hume's His. Eng., p. 344.

I quote the same author for the following instance of a still greater stretch of this arbitrary and unconstitutional power, which occurred during the same reign:

"No measure of Elizabeth's reign can be compared, in point of illegality, to a commission in July, 1595, directed to Sir Thomas Wilford, whereby, upon no other allegation than that there had been of late sundry great unlawful assemblies of a riotous sort, both in the city of London and the suburbs, for the suppression whereof (for the insolency of many desperate offenders, is such that they care not for any ordinary punishment,) it was found necessary to have some such notable rebellious persons to be speedily suppressed by execution to death, according to the justice of *martial law;* he is appointed provost marshal, with authority by the magistrates, to attack and seize such notable, rebellious and incorrigible offenders, and in the presence of the magistrate to execute them openly, on the gallows."

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"This peremptory style of suspending the Common Law was a stretch of prerogative without an adequate parallel, so far as I know, in any former period." *Id.*, 143, 144; 4 Hume's His. Eng. p. 344.

It must be remembered that these high-handed measures took place in the sixteenth century, a period when both religious and political revolutions were rife in Europe; that the life of Elizabeth, was more than once the object of conspiracies, both foreign and domestic; that the ablest men in Europe were parties to and prompters in these perfidious and bloody schemes; (Motley's Dutch Republic, vol. 2, part 3, p. 333; and D'Israeli's Curiosities of Literature, 1st ser., p. 166;) that the very persons at whom these proclamations were aimed, had, in the preceding reign of her sister, employed the same agencies for the overthrow of her religion in the kingdom, and the destruction of her friends; that the constable's and marshal's court, "whose jurisdiction was considered as of a military nature," and whose proceedings were not according to the course of the common law, had "sometimes tried offenders"—not soldiers—by what was called *martial law*, "either during or not long after a serious rebellion;" and, above all, that, at the time of the last-mentioned proclamation, the queen was a very old woman, and, it may be, somewhat subject to fits of ill temper. All these things must be reckoned in her favor, to mitigate the judgment of history against these arbitrary measures; but still can not save the acts themselves from the indignant condemnation of mankind. Accordingly we find Lord Coke, in the next reign, condemning utterly the doctrine that the king's proclamation can either

alter, repeal, or suspend the law, or make that criminal, which before was not. He says:

"The King can not create any offence by his prohibition or proclamation, which was not an offence before; for that was to change the law, and to make an offence which was not; for *ubi non est lex, ibi non est transgressio:* therefore that which can not be punished without proclamation, can not be punished with it." "But," he further remarks, "we do find divers precedents of proclamations which are utterly against law and reason, and for that void; *quæ contra rationem juris introducta sunt, non debent trahi in consequentiam*"—i. e., measures introduced contrary to the reason of the law, ought not to be drawn into consequence, or precedent. Again, he says that it had been held that the king, by his proclamation can not create any offence which was not an offence before, "for then he may alter the law of the land by his proclamation, in a high point; for, if he may create an offence where none is, upon that ensues fine and imprisonment: Also the law of England is divided into three parts:—common law, statute law, and custom; but the King's proclamation is none of them: also, *malum aut est malum in se, aut prohibitum*, that which is against common law is *malum in se, malum prohibitum* is such an offence as is prohibited by act of Parliament, and not by proclamation." 12 Rep., pp. 74, 75, 76.

Yet, notwithstanding the law was thus cogently laid down in the time of James the First, we, nevertheless, find Charles the First, in the first year of his reign, endeavoring to return to the bad and unlawful measures of his predecessors. He accordingly addressed a commission to Lord Wimbleton, 28th December, 1625, empowering "him to proceed against soldiers, or dissolute persons joining with them, who should commit any robberies, &c., which by *martial law* ought to be punished with death, by such summary course as is agreeable to *martial law.*" He, also, issued another commission of the same kind, in 1626. See, Hallam's Const. His., p. 223, and note.

These unlawful proclamations, among other grievances, subsequently moved Parliament to demand of his majesty the justly celebrated Petition of Right, which forever put an end to all colorable pretences of their legality. Let it be observed, too, that this great act is but declaratory of the common law. No measure was ever supported on the side of the Parliament with greater force of talents and learning; or opposed by the king with worse show of reason, or more bare-faced attempts to deceive the public, and to prevent its final passage. Among the managers of the Commons, on that occasion, may be reckoned the great names of Coke and Selden—two names that may, perhaps, be equaled, but certainly not surpassed, for learning and ability, in English history. Under their management the measure was finally perfected and passed; and became a new

guaranty of Anglican liberty. I shall make no apology for reading here such parts of it as I deem pertinent to the subject under consideration. They are as follow:

"And whereas, also, by the statute called the Great Charter of the Liberties of England, it is declared and enacted, that no freeman may be taken or imprisoned, or be disseized of his freehold or liberties, or his free customs, or be outlawed, or exiled, or in any manner destroyed but by the lawful judgment of his peers, or by the law of the land.

"And in the eight and twentieth year of the reign of King Edward III, it was declared and enacted by authority of Parliament, that no man, of what estate or condition that he be, should be put out of his lands or tenements, nor taken, nor imprisoned, nor disherited, nor put to death, without being brought to answer by due process of law. * * *
* * * * * * * * * * * *

"And whereas, also, by authority of Parliament in the five and twentieth year of the reign of King Edward III, it was declared and enacted, that no man should be forejudged of life or limb against the form of the Great Charter and the law of the land; and by the said Great Charter, and other, the laws and statutes of this your realm, no man ought to be adjudged to death but by the laws established in this your realm, either by the customs of the same realm, or by acts of Parliament: and whereas, no offender of what kind soever, is exempted from the proceedings to be used, and punishments to be inflicted by the laws and statutes of this your realm: nevertheless, of late time, divers commissions under your majesty's great seal have issued forth, by which certain persons have been assigned, and appointed commissioners with power and authority to proceed within the land according to the justice of *martial law*, against such soldiers, or mariners, or other dissolute persons joining with them, as should commit any murder, robbery, felony, mutiny, or other outrage or misdemeanor whatsoever; and by such summary course and order as is agreeable to *martial law*, and as is used in armies in time of war, to proceed to the trial and condemnation of such offenders, and them to cause to be executed and put to death according to the law martial.

"By pretext whereof some of your majesty's subjects have been by some of said commissioners put to death, when and where, if by the laws and statutes of the land they had deserved death, by the same laws and statutes also, they might, and by no other ought, to have been judged and executed.

"They do, therefore, humbly pray your most excellent majjesty * * * * * * * * that the aforesaid commissions for proceeding by *martial law*, may be revoked and annulled; and that hereafter no commissions of the like nature may issue forth to any person or persons whatsoever

to be executed as aforesaid, lest by colour of them any of your majesty's subjects be destroyed, or put to death contrary to the laws and franchises of the land."

And to this prayer the King was finally compelled to answer, "*Soit fait comme est desire*—be it as it is desired."—2 Parl. His., p. 374, *et seq.*; and Creasy on the Eng. Const., pp. 260–264.

But this act was no sooner passed than the perfidious King set about violating its provisions; whereby he finally drove his Parliament and people into open rebellion against him. In the contest which ensued they beat him, took him, and beheaded him, by the judgment of a tribunal not better in point of constitutionality, than those by which he had doomed many of his subjects to death. The engineer was thus literally "hoist with his own petar." "The curse," which he had more than once sent abroad over his kingdom, thus at last, "came home to roost."

It is unnecessary for our purpose to notice in detail the measures of the next two reigns. Let it suffice for the present to say that in the 31 Car. 2, the justly celebrated *habeas corpus* act was passed; and the personal liberty of the subject thereby more effectually guaranteed than ever before; and that for attempting to procure its repeal, dispense with acts of Parliament by commission or otherwise, and other similar illegal measures, his brother, James the Second, was obliged to abdicate, and fly the kingdom, and William and Mary were called to the throne. 1 Macaulay's His. Eng., 186; 2 *Id.*, 3; *Id.*, 62, 64.

Upon the accession of William and Mary the great principles of Anglican liberty were again distinctly asserted in the Bill of Rights; and all the guarantees thereof reaffirmed. (Creasy on the English Constitution, p. 284, *et seq.*) Since that event there has been no trial of any citizen by *martial law* in Great Britain. The writ of *habeas corpus* has been suspended often; and in two instances, arising from both rebellion and invasion, *martial law* has been proclaimed; but it has never been carried further than to the arrest and imprisonment of suspected persons, until trial by the ordinary tribunals could be had. One would think, too, from a perusal of the State Trials which followed these invasions and rebellions, that the punishments inflicted were both certain and sanguinary enough to satisfy all the ends of State Justice. It will be understood, of course, that I speak of the invasions of the Pretender in 1715, and again in 1745. But that I am not mistaken in regard to the fact, that *martial law* was not in either instance enforced to the trial and punishment of any citizen, and has not been in any other instance since or before, subsequent to the abdication of James the Second, I beg leave to show by reference to the case of *Grant v. Gould*, 2 Hy. Bl. Rep. 89; and the following passage from DeLolme's excellent treatise on the Constitution:

"At the time of the invasions of the Pretender, assisted by the forces of hostile nations, the *habeas corpus* act was, indeed, suspended; (which, by the by, may serve as one proof, that in proportion as a government is in danger, it becomes necessary to abridge the liberty of the subject;) but *the Executive power did not thus of itself stretch its own authority.* The precaution was deliberated upon and taken by the representatives of the people; and the detaining of individuals in consequence of the suspension of the act, was limited to a certain fixed time. Notwithstanding the just fears of internal and hidden enemies, which the circumstances of the times might raise, the deviation from the former course of law was carried no further than the single point we have mentioned. Persons detained by order of the government were to be dealt with in the same manner as those arrested at the suit of private individuals, the proceedings against them were to be carried on no otherwise than in a public place; they were to be tried by their peers; and have all the usual legal means of defence allowed them—such as the calling of witnesses, peremptory challenges of jurors, &c."—DeLolme on the Const., by Macgregor, p. 274.

It has been supposed by many that *martial law* was proclaimed in England in 1780, during the great Protestant riot, headed in its incipiency by the celebrated Lord George Gordon. It is a mistake however, due, perhaps, to the discussions in Parliament soon after that event, in relation to the King's ordering the military to suppress the riot, and which was done by direct military force. It was supposed then, by many members of Parliament, that this could not be done without a declaration of *martial law;* and in that view the proceeding was condemned by them, and especially by those in the opposition. Two speeches, however, in the House of Lords may be regarded as triumphantly maintaining the contrary opinion. I allude to the speeches of Lord Chief-Justice Mansfield and Lord Chancellor Thurlow. In order that the Commission may see the ground on which the action of the military was placed by these great men, and by Parliament,—for that body adopted their views,—I shall submit a brief quotation from that of the former, which has ever since been regarded by the English bar as an authority. It is as follows:

"I presume it is known to his majesty's confidential servants, that every individual in his private capacity, may lawfully interfere to suppress a riot, much more to prevent acts of felony, treason, and rebellion. Not only is he authorized to interfere for such purpose; but it is his duty to do so; and, if called upon by a magistrate, he is punishable in case of refusal. What any single individual may lawfully do for the prevention of crime, and preservation of public peace, may be done by any number assembled to perform their duty as good citizens. It is the

peculiar business of all constables to apprehend rioters, to endeavor to disperse all unlawful assemblies, and, in case of resistance, to attack, wound, nay, kill those who continue to resist; taking care not to commit unnecessary violence, or to abuse the power legally vested in them. Every one is justified in doing what is necessary for the faithful discharge of the duties annexed to his office, although he is doubly culpable if he wantonly commits an illegal act, under the color or pretext of law. The persons who assisted in the suppression of these tumults, are to be considered mere private individuals, acting as duty required.

"My Lords, we have not been living under *martial law*, but under that law which it has long been my sacred function to administer. For any violation of that law, the offenders are amenable to our ordinary courts of justice, and may be tried before a jury of their countrymen.

"Supposing a soldier, or any other military person, who acted in the course of the late riots, had exeeded the powers with which he was invested, I have not a single doubt that he may be punished, not by a *court-martial*, but upon an indictment to be found by the grand inquest of the city of London, or the county of Middlesex, and disposed of before the ermined Judges sitting in Justice Hall, at the Old Bailey. Consequently, *the idea is false that we are living under a military government, or that since the commencement of the riots any part of the laws, or of the Constitution, has been suspended, or dispensed with.* I believe that much mischief has arisen from a misconception of the Riot Act, which enacts that, after proclamation made, persons present at a riotous assembly shall depart to their homes, and that those who remain there above an hour afterwards, shall be guilty of felony, and liable to suffer death. From this it has been imagined that the military can not act, whatever crimes may be committed in their sight, till an hour after such a proclamation has been made, or as it is termed, 'the Riot Act is read.' But the riot act only introduces a new offence—remaining an hour after the proclamation—without qualifying any pre-existing law, or abridging the means which before existed for preventing or punishing crimes." 2 Campbell's Lives of the Chief Justices, pp. 401, 402.

The same can not be said, however, of the dependencies of the British crown. Indeed, Ireland, the Indias, and other provinces have been frequently subjected to the rigors of *martial law* —the will of the king's lieutenants, or of the commanding general. But then, it must be remembered that *martial law* has not been the only hardship or outrage inflicted upon them. Any one who will but read the trial of Warren Hastings, must be satisfied, notwithstanding his acquittal, that in her colonies and dependencies, Great Britain inflicts, permits, or can not prevent great crimes against the people. Who does not remember to have read of the terrible punishments inflicted during the

Sepoy rebellion? A man of sensibility can see "in the mind's eye," the quivering fragments of the victims of *martial law* flying through the air, as they are blown from the mouths of cannon; and yet even the holy horror which our English cousins manifest at our cruelty in the present war, has not won our favor for their mild and christian warfare as practiced in India. May we never be won to approve or practice such lessons of humanity! They really seem to regard their provinces as subject to the absolute will of the domestic government, very much as our law books treat our territories. The constitution and laws do not exist for them. It was to rid themselves of such a relation, and from the oppressions incident to it, that the people of America rebelled against the parent country; and, after eight years of war, established their independence and freedom.

But before I quit this subject, I beg leave to notice two cases occurring in remote possessions of Great Britain; and which have become marked in history, from the fact that they were brought within the reach, and subjected to the public opinion and laws of that island.

The first of these, is the case of Col. Wall, Governor of Goree. It seems that this officer, upon some apprehension of mutiny in the forces at his post—an apprehension which may or may not have been well founded, so far as I have been able to learn from the very meager report of the evidence found in the Annual Register for 1802, pp. 560, convened a drum-head court-martial one evening upon dress parade, and ordered a sergeant before it for immediate trial. The court adjudged him guilty and sentenced him to receive eight hundred lashes, which were thereupon inflicted on the spot, by the servants of the Governor, who stood by and urged them to lay on, employing language indicative of great passion. The sergeant died of the flogging. The Governor returned to England, where, after some two or three years had elapsed, he was arrested on a charge of murder. He escaped, and remained absent for seventeen or eighteen years, when he returned to England, was re-arrested, indicted, tried at the Old Bailey, convicted and hung for murder, in 1802. This case strongly marks the light in which *martial law* is regarded when enforced against Englishmen; and the writer of the re-report of the trial, in the Register, employs the whole case as an illustration, on the one hand, of the harshness of *martial law;* and, on the other, of the impartial justice of English courts and juries.

The second case is that of missionary Smith, in Demarara. He was a missionary to the negroes of that colony. Among these, in 1823 or 1824, an insurrection broke out; *martial law* was proclaimed; and the rebellion almost immediately suppressed. Having already incurred the ill-will of the planters, as the

reward of his kindness to their slaves, he was arrested on a charge of having had knowledge of the insurrection before the fact, and failing to communicate it to the authorities; and was brought to trial upon this charge before a court-martial, and convicted and sentenced to be hung. Before the time for his execution arrived, however, he had died of consumption. This fact alone, it would seem, from what subsequently transpired in Parliament, saved the parties to this trial—the Governor and members of the court from being proceeded against criminally. Sir James Mackintosh, in a speech of great power, delivered before the House of Commons in regard to this case, said that "the acts of this court were nullities, and their meeting a conspiracy; that their sentence was a direction to commit a crime; that, if they had been obeyed, it would not have been an execution, but a murder; and that they, and all other parties engaged in it, must have answered for it with their lives." Miscellaneous Essays, &c., p. 542. Lord Brougham, in a masterly speech delivered on the same occasion, maintained and demonstrated the nullity of the sentence, and the criminality of the court. 1 Speeches, p. 390-391. Out of Parliament, the Edinburgh Review took up the case, in an unanswerable and scathing article of more than forty pages, and condemned the whole proceeding to everlasting infamy. 40 Vol., p. 226, (Old Series).

I have been able to find but two instances in which the British Government declared *martial law* in this country, during the revolutionary war. The first of these occurred at Boston, Massachusetts, June 12, 1775, at which time General Gage issued his proclamation of *martial law*, resting it expressly upon the ground that, owing to the rebellion of the people, the ordinary courts of justice were closed, and the course of justice therein stopped; and the consequent necessity of proclaiming *martial law* as a substitute for the common law. Let it be remembered, that this was nearly two months after the battles of Concord and Lexington, and but five days before that of Bunker Hill, and that Boston was, at the time, almost in a state of siege, and it will scarcely be thought, by any one living in our country to-day, that this procedure was premature. Nevertheless, in the opinion of Americans of that day, it was an outrage well worthy to crown all the rest for which they were then everywhere rushing to arms. It was spoken of in the old Congress as an attempt "to supercede the course of the common law, and instead thereof, to publish and order the use of *martial law*." Journal of the Old Congress, 147; Ann. Reg. 1775, p. 261.

Governor Dunmore adopted a similar measure in Virginia, November 7th, 1775, which the Virginia Assembly met and denounced as "an assumed power which the King himself can not exercise; because it annuls the law of the land, and intro-

duces the most execrable of all systems—*martial law.*" 4 Am. Archives, 87; Ann. Reg., 1775., p. 28.

Sometime after the close of the war of Independence, and about the time of the adoption of our present constitution, I believe in the year 1787, a rebellion occurred in the State of Massachusetts. It is known in history as Shay's rebellion. When it became too strong for the civil arm of the State government, and the *militia* were finally called out, it was not to supercede the civil authority, but was strictly employed in aid thereof. The writ of *habeas corpus* was, indeed, suspended for a brief period; but no *martial law* was proclaimed or enforced against the insurgents. On the contrary, Governor Bowdoin directed General Lincoln to "consider himself in all his military offensive operations, constantly as under the direction of the civil officer, saving when any armed force shall appear and oppose his marching to execute these orders." In this way, the rebellion, though formidable both for its numbers, and the extensive sympathy it received among the people of the State who did not yet openly engage in it, was put down almost without bloodshed; and peace, order and good feeling were restored.

I am now brought to the era of the Federal Constitution; and we can form some notion of what was, most likely, the opinions and sentiments of its authors in relation to *martial law*, as an incident of the Government they were about to establish for themselves. They had received their notions of law from a country in which *martial law* had not been exercised for more than one hundred years; they had suffered, in two instances, during the late war, the outrage of *martial law;* and had repelled and denounced it as wholly incompatible with the limitations imposed by law upon the King's prerogative. They had claimed the great acts of English liberty as their rightful inheritance. (4 Franklin's Works, 274.) They had asserted their independence; because, among other reasons, the King "had affected to render the military independent of, and superior to, the civil power," which was simply an attempt to establish *martial law.* And, finally, they had just seen a formidable domestic rebellion, in one of the States, go down before the local authorities thereof, without a declaration of *martial law*, and almost without the shedding of blood. Now, may I not ask, Is there a single fact in all the experience of these men, that could possibly have given rise to a wish on their part for a government capable upon every occasion offered by invasion or rebellion, of suspending all its ordinary functions, and calling into play, "the odious system of *martial law?*" On the contrary, we are led to conclude that with the ordinary feelings of men, they must have been utterly and intensely hostile to any such power in their government. This would be our conclusion, if they had left us no record on the subject. But they have left us their solemn testi-

mony in the constitution, and it completely sustains the conclusion to which we are led by reasoning from the history of the past, and their experience; for, if ever any constitution did entirely shut out the idea of any power being vested in any department of the government, to declare *martial law*, it is that of the United States of America. From its very nature, no less than by its express terms, any such power is rendered totally impossible, while a vestige of the constitution remains. Let us examine it, and see.

In the first place it is a government created by a written constitution, which limits it to the exercise of specified powers. The first section of the instrument stamps its entire character. Thus: "All legislative power *herein granted*, shall be vested," &c. But this is not all. After granting the powers intended for the government, it limits them by express denials of others, which would otherwise have been embraced in those granted. The ninth section of the first article, is thus wholly devoted to these denials of powers. Among these negative provisions are some utterly incompatible with the notion that the framers of the constitution could have entertained the thought, even for a moment, of conferring the power upon any department of the government, to declare *martial law* over the whole United States, or any part of it, where the presence of embattled hostile armies had not already suspended all civil authority. Take a single instance: "The privilege of the writ of *habeas corpus shall not be suspended*, unless when, in cases of rebellion or invasion, the public safety may require it." Now, we have already seen that *martial law* is the suspension of the civil law, and of all the functions of the civil government—not only of the writ of *habeas corpus*, but of all other process and laws whatever. Why should the constitution limit the power of suspending privileges to the writ of *habeas corpus* alone, and strictly to cases of rebellion and invasion, "*when the public safety may require it*," if its authors had understood, or intended that, in every such case, all other provisions of the constitution and laws, designed to protect the citizen against the encroachments of arbitrary power, might be suspended at pleasure, by the President, all over the country; or by any General, all over his department? The specific limitation of this power of suspension, to this one writ, in any extreme public necessityt, he public safety, "in cases of rebellion or invasion," forever explodes the notion that they intended to confer, in such cases, the power to suspend all other writs and rights arising under the constitution and laws of the land. The expression of one excludes the rest.

Let us, however, briefly consider this pretended power to proclaim *martial law* with special relation to a government like ours—a government with a written and limited constitution.

The power in question, provided it exist, must reside in some one, or in some two, or in all three of the departments of the government. The categories are exhaustive.

It will not be pretended that it resides in the Judiciary alone; nor, indeed, that any portion of it is vested therein. All writers who have supported the power, are silent as to any portion of it residing in the Judiciary. But not only so, the Supreme Court itself, when called to discuss the subject, seem to regard it as vested elsewhere by the constitution, provided it exist at all. This is as it should be; for that department is, by its charter, confined to the exercise of judicial functions; and it will not be claimed that the entire suspension of such functions, and the laws upon which they depend, is a judicial function. Such a suspension of the Judiciary must come from without that department. It has to do with the laws, and with rights and wrongs under them; and as long as a case is presented to the courts under existing laws, they must from their nature needs act upon it. But this constitutional necessity under which the Judiciary is placed, is directly at war with the nature and existence of *martial law*, which puts an end, for the time being, to the courts. In other words, *martial law* can only exist when the courts have ceased to exist. As long as they remain open, *martial law* remains impossible. Hence, the courts can not possess any power to declare, or aid others in declaring *martial law*. The power in question must, therefore, reside in the Legislative, or Executive departments separately; or in both together, provided it exist at all.

Is the power in question vested in Congress alone? If so, then what follows upon its exercise? Have you ever thought of that? If you have not, let me show you what must be the result. It is this: A declaration of *martial law* would, for the time being, put an end to the functions of Congress; and it would do so, by placing an absolutely unlimited power in the hands of the President, or of his Generals. Now, if Congress had this absolute power to bestow, does not all history tell us that once gone from their hands, it would be gone forever? But you know that Congress has no such power to confer. A single limitation upon the powers of Congress gives the lie to any such assumption of power as is implied in a proclamation of *martial law*. And yet the whole charter of Congress is hedged in by limitations—nothing but limitations;—limitations as to the subjects of their jurisdiction;—limitations as to their mode of proceeding in the attainment of specified objects;—and limitations by the express reservation of all powers not granted to the Federal Government, to the people or the States. All the powers denied to Congress in the Constitution, leave that body so much less power than is necessary to a proclamation of *martial law*. All the powers reserved to the people and States by

the Constitution is a further limitation of the power requisite to a proclamation of *martial law*. All the power legitimately in the hands of the Judiciary, is still a further limitation of the power requisite to enable Congress to establish *martial law*. And the same may be said of the rightful powers of the Executive. Hence, it is plain that Congress has no power to proclaim or authorize the proclamation of *martial law*, which, according to the definition thereof, given by all writers on the subject, makes *the will of the Commander-in-Chief the supreme and only law of the land;* or, to use the language of Mr. Webster, empowers the "officer clothed with it, to judge of the degree of force that the necessity of the case may demand; and," he adds, "there is no limit to this, except such as is to be found in the nature and character of the exigency." Webster's Works, 6 vol., pp. 240, 241.

But grant for the argument, that Congress has this power, what would be the inevitable result of its exercise? All history tells us that such an act would be the suicide of the National Legislature. All liberty, all laws designed to secure liberty, all free institutions would perish by the rash act; for what would laws, liberties, institutions, or life itself be worth when all were placed at the will of an absolute master? The exigency in which such power passed from the representatives of the people, would be readily continued by him on whom it was conferred. The government would be changed by the act from the freest to the most simple and absolute despotism on earth. Congress, therefore, has no such power to confer; 1. Because it is incompatible with the limitations imposed upon the powers of that body, both by denial and reservation. 2. Because it would be a power of self-destruction; and we can not justly hold that it was intended by the framers of the Constitution, that any Congress should, in its discretion in a given emergency, put an end, not only to its own existence, but to the possible existence of any future Congress.

If the power in question belongs to the President alone, then, in times of invasion or rebellion—times like these—the constitution of the country affords no better guaranty for the security of the lives, liberty and property of the people, than his will. And is that the end of the labors and solicitude of Washington and his compatriots, for the establishment of a free people upon the American continent? What signifies a limitation on the power of the Judiciary and on that of Congress, if the President has, in any event, an unlimited power over both, and all else in the land? The power, then, does not belong to the President alone.

The same result is attained, if the power to proclaim *martial law* is conceded to reside in the Congress and President jointly; or, indeed, in all the departments of the Government together; for

its exercise involves the transformation of the entire government from one limited and free, at least in form, to one unlimited and despotic both in form and in fact. So that, in any view we can possibly take of this power, it can not exist in a limited government created by a written constitution. It is, indeed, an absurdity too gross to be admitted, until all pretense of liberties and rights on the part of the people is utterly abandoned.

But let us now glance at the war power conferrred by the constitution upon the government, and ascertain where it is vested. Is any part of it bestowed upon the President by original constitutional grant? If not, upon what basis are we to rest the stupendous powers claimed for him, as the foundation of your jurisdiction? Let us examine and see how he stands.

He is, I grant, appointed Commander-in-Chief by the constitution; but where is his command? It is in the discretion of Congress. If that body determine to have no army, why, then, the President can have none to command. If Congress takes the same view in regard to a navy, the President again, will be in precisely the same situation as a naval officer. Without an act of Congress he can not, therefore, raise a single soldier, or seaman, or build a ship, or fort, or do any other military act whatever. If Congress do not raise an army he can have no military power to repel invasion, or suppress insurrection. But, if Congress authorize him to raise an army and navy, and provide him with the means necessary to the end, they may still provide just such rules and regulations for the government thereof as they please, and may thus leave him little or no power over either. The same is true of the militia of the several States. They are to be organized, armed and disciplined according to the will of Congress; and Congress alone has power to provide for calling them forth to execute the laws of the union, suppress insurrection, and repel invasion. The President is powerless on all these subjects until Congress invigorate him. The very terms which designate him as Commander-in-Chief of the army and navy, and of the militia of the several states, limit his power over the last, until they are "called into the actual service of the United States." Is it not preposterous, then, to say of such an officer—one so entirely dependent upon Congress for every element of military power, and bound to accept it subject to just such rules and regulations as they impose, that he is, nevertheless, authorized upon a given emergency "to sweep the constitution and laws of the country by the board," as Mr: Adams expressed it; to annihilate, for the time being, all the powers and functions of Congress and the Judiciary, by virtue of this same power, thus dependent upon Congress; and, going still further, to create a new political society by equalizing all the people of the several states, by abolishing their several governments and institutions, and consolidating them into one social and political state, subject

to one law only—his own mere will; for this is *martial law*. The power contended for by the Judge-Advocate, as the basis of your jurisdiction, leads to this monstrous result; and some of the opinions cited in support of it, may even go to this extent.

It is, therefore, plain to my mind that the several departments of the government do not possess the power in question, either jointly or severally; for, if given, it would be a power to subvert the constitution and overthrow the government.

But the nature and objects of the political society over which the government of the United States was organized to preside, precludes the idea that any such power, as that of declaring *martial law*, can exist therein That society is defined and limited in its objects and purposes by the constitution; and, in fact, has no existence beyond the terms of that instrument. The relations that in all consolidated nations most deeply and nearly interest mankind, and most strongly bind them together, are not embraced in the purposes and scope of the federal union at all. It is in the states that the great elements and relations of political society are principally found. The government of the union can not, therefore, assert the power in question, for two reasons, namely:

1. Because the people of the several states of the union have formed no society—no community—beyond that which results from the terms of the constitution;

2. Because the exercise of such a power by the federal government would destroy the several distinct societies now represented by the several state governments; and to such destruction neither the people nor the governments of the States have ever consented.

But from such destruction of the states follows inevitably the destruction of the federal government; for the states are in many and essential regards constituents of that government, which can not exist without them.

That the federal government is thus limited by its constitution, and from the special character of the political society upon which it rests, is proven by its whole history. It can not, like a government of general powers, with no limitations upon them which it may not by its own legitimate act remove, exercise any power not conferred upon it by the charter of its creation. If its officers should do so, their acts are not the acts of the government; but simply the acts of the individuals who do them; and are in no wise binding upon the people who have never consented to them. *Whitaker v. English*, 1 Bay's Rep., 15; *Thayer v. Hedges et al.*, 22 Ind. Rep., 282; *Wilcox v. Griffin*, 21 *Id.*, 370; and *Little et al. v. Barreme et al.*, 2 Cranch's Rep., p. 170.

In this respect the British government has greatly the advantage over ours; for there are no written limitations upon its

powers, which Parliament—being omnipotent—may not expand, or remove altogether. A declaration of *martial law* by an act of Parliament; or under an authority granted thereby; or with the assurance that an act of indemnity will follow it, is in no wise inconsistent with the British constitution. The highest written element in that constitution does not rise above an act of Parliament. Parliament at all times represents the entire sum of all the politico-social capability, or possibility of the whole country. It may, therefore, properly take any step it may deem necessary for the conservation of the society over which it presides. As Parliament itself is but a means to an end—the preservation and well-being of that society—it may, in a great emergency, without violating any fundamental principle, surrender its own existence. And yet, a declaration of *martial law* is said to be unconstitutional there, by a high legal and military functionary of that country. *Houyh's* Precedents in Military Law, p. 543.

In view of all this, it seems passing strange that the government of the United States should ever have been compared with that of Great Britain in relation to the establishment of this transcendent fact; and still more strange that the President should have been set up as the equal in this respect of the king—nay, as his superior. The entire proceedings of the convention that framed the constitution, go to discountenance any such position. They intended to create an executive with altogether less authority than the king of Great Britain; and they succeded in doing so, if it is possible to impose limitations by means of a written constitution. How they regarded this part of their work, after its accomplishment, may be learned from the Federalist. (No. 69, Hallowell's ed., 1831, p. 347.) It is not contended that the king can rightfully suspend the writ *habeas corpus;* but, in times of great emergency, he is permitted to do so until the next meeting of Parliament, when an act of indemnity must be passed for the protection of those who were, in anywise engaged in such suspension, against civil prosecutions on account thereof. Now, this act of indemnity is an admission of the original illegality of the previous suspension; for it is passed for the purpose of curing it, and giving it the sanction of law. But Dr. Francis Lieber maintains that there can be passed no valid act of indemnity by a government created by, and acting under, a written constitution like ours; and this opinion he cites in a second treatise published many years after his work on "Legal and Political Hermeneutics" was given to the public. (Hermeneutics, pp. 79, 80; and Civil Liberty and Self-Government, vol. 1, p. 134.) If argument were wanting to support this authority, it arises from the very nature of our constitution. But I leave it to stand upon the authority of a great name, adorned not only by great learning devoted to

the noblest purposes of science; but, also, to the support of the cause of his adopted country in the existing struggle for the integrity of its territory and the supremacy of its constitution. And yet, I know there are not wanting men, native to the manor born, who claim that the President has the power, under the constitution, to suspend the writ of *habeas corpus*. But do they forget that no such opinion was ever expressed by any one who had a hand in framing the constitution, or who lived and acted with them. Mr. Jefferson did not think so. (2 Jefferson's Corresp., p. 274, 291; *Id.*, 344.) On the contrary, he went to Congress and asked for a suspension of the writ at the time of Burr's conspiracy; and, while they refused to suspend it, not a member of that body was found to question the fact that the power to pass such an act, under proper circumstances, was vested in them. 3, Benton's Debates in Congress, p. 504, *et seq.*

About the same time, in the case of two men imprisoned by order of the President for complicity in that conspiracy, Chief-Justice Marshall, in speaking upon the writ of *habeas corpus*, and the act of Congress which authorizes judges and courts of the United States to grant it, said:

"It may be worthy of remark that this act was passed by the first Congress of the United States, sitting under a constitution which had declared 'that the privilege of the writ of *habeas corpus* should not be suspended, unless, when in cases of rebellion or invasion the public safety might require it.' Acting under the immediate influence of this injunction, they must have felt with peculiar force the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they gave all the courts the power of awarding writs of *habeas corpus*.

* * * * * * * * * *

"If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, *it is for the Legislature to say so*. That question depends on political considerations, *on which the Legislature is to decide. Until the legislative will be expressed, the court can only see its duty, and must obey the laws.*"—4, Cranch's Reports, pp. 75, 137.

In this opinion concur all respectable authorities that I have been able to consult. Among them are Rawle, Sedgewick, Story and the late Chief-Justice Taney. Rawle on the Const., pp. 114, 115; 2 Story on the Const., § 1342; Sedgewick on the Const. and Statue Law, p. 598; and 9 Am. Law Reg., p. 524.

But, if the President has no power to suspend the writ of *habeas corpus*, and Congress no power to indemnify him, and those acting under his orders, for forcibly denying it, then it follows that he can not have the far greater power of proclaiming

martial law—a power which embraces the suspension not only of the writ of *habeas corpus*, but of all other writs and laws, even the Constitution itself.

And, hence, I conclude, that there is not, and can not possibly be, any power in a government like ours to declare *martial law*, unless it be upon the theater of active military operations; and that every such declaration of *martial law*, in any state, or place, not subject to such operations, is mere naked unauthorized force, and altogether unjustifiable; that the true test of the presence, in any state or place, of such military operations as justifies a proclamation of *martial law*, is found in the fact that the courts of justice therein are closed, and the administration of justice stopped by the presence of hostile armies; that, whenever that is not the case in any part of the United States, *martial law*, in no possible view, can rightfully exist; and, finally, as the courts of justice in this State are proven, in this case, to be open at this time, and to have been so all the time, both before and since the arrest of the accused, any attempt to enforce *martial law* against them is a grievous wrong, not only to them, but to the whole country; and, indeed, to the general cause of freedom and free government throughout the world.

While upon this branch of the subject—the power to declare *martial law*—I beg leave to repeat a few propositions urged in a former trial. I am now prepared to support them by high military authority, which was not then at hand. They are as follow:

"The charges in this cause involve capital and infamous crimes; and the constitution of the United States expressly provides that

"'No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger.' (Amend. Const. U. S., Art. 5.) And, again, 'in all criminal cases, the prisoner shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where the crime shall have been committed,' &c. Amend. Const., Art. 6.

"These provisions were adopted after the organization of the government of the United States under the present constitution, and for the purpose of placing the trial by jury entirely beyond the power of Congress, and of all other branches of the government. The constitution, as originally adopted, contained the following provision on the subject: 'The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where such crime shall have been committed.' (Art. 4, § 2.) So jealous were the people of the right in question that they required the amendments I have already quoted notwithstanding this original provision.

"The accused are citizens of the United States, and of the state of Indiana, not in the land or naval forces, or in the militia in actual service. They are, therefore, not within the exception of the fifth article of amendments just cited. The exception does not affect their right any more than if it did not exist. [On the contrary, it makes it altogether more clear and undeniable.] These several provisions are absolute as to them; and if any constitutional provisions can protect a right, it would seem they ought to be protected from a trial not in conformity with them. Indeed, it would seem, they can not in fairness be tried without being first presented or indicted by a grand jury, nor without a petit jury of the district wherein their alleged offenses were committed."

Lieut. General Scott, in his Auto-Biography, republishes an article published by him in the National Intelligencer, in 1842. From this article I extract the following paragraphs, which immediately follow the amendments of the constitution already quoted:

"If these amendments do not expressly secure the citizen, not belonging to the army, from the possibility of being dragged before a *council of war, or court martial,* for any crime, or on any pretense whatsoever, *then there can be no security for any human right, under any human institutions!*

"Congress and the President could not, if they were unanimous, proclaim *martial law* in any portion of the United States, without first throwing these amendments into the fire. If Mr. Madison, (begging pardon of his memory for the violent supposition,) had sent an order to General Jackson to establish the odious code over the citizens of New Orleans, during, before, or after the siege of that capital, it would have been the duty of the general, under his oath, to obey the constitution, and to have withheld obedience; for, by the ninth Article of War, (the only one *on orders,*) officers are not required to obey any but 'lawful commands.'" Vol. 1, p. 292.

Again, he says:

"When Pompey played the petty tyrant at Sicily, as the lieutenant of that master despot Sylla, he summoned before him the Mammertines. That people refused to appear, alleging that they stood excused by an ancient privilege granted them by the Romans. 'What,' said Sylla's lieutenant, 'will you never have done with citing laws and privileges to men who wear swords.' Roman liberty had already been lost in the distemperature of the times. * * * * * * If Pompey had gained the battle of Pharsalia, would his odious reply to the Mammertines have been forgiven by the lovers of human liberty? *With such maxims of government,* it was of little consequence to the Roman world that Cæsar won the day. A Verres would have been as good as either." *Id.*, p. 294.

He also gives the following fact in our own history, which, although a little out of its place, I yet beg leave to insert as indicative of the spirit in which the struggle of 1776 was conducted by the founders of our government:

"In South Carolina, during the Revolutionary War, at the moment when Sir Henry Clinton was investing the devoted city of Charleston, and the tories in arms everywhere, the Legislature empowered her excellent Governor, John Rutledge, after consulting with such of his council as he conveniently could, 'to do everything necessary for the public good, *except the taking away of the life of a citizen without legal trial.*' Under that exception at a time when there was no constitution of the United States, there was no *Louallier* deprived of the one, and put in jeopardy of the other, by *martial law.*" *Id.*, pp. 297, 289.

But the same distinguished General has consistently, throughout his whole life, maintained the same opinions on this subject. In the month of October, 1846, he submitted to Secretary Marcy a *projet* for the purpose of enabling generals of our armies, then in the field in Mexico, to enforce *martial law* for the protection of our armies against lawlessness on the part of the people of that country, and the people against lawlessness on the part of our soldiers, in cases not provided for in our Articles of War. In this communication, among many other things, he says:

"It will be seen that I have endeavored to place all necessary limitations on *martial law.* 1. By restricting it to a foreign hostile country. 2. To offenses enumerated with some accuracy. 3. By assimilating *councils of war* to *courts martial.* 4. By restricting punishments to the known laws of some one of the States," &c.

And, having shown the course usually pursued by British Commanders, under like circumstances, he proceeds to say:

"This law"—he was asking for an act of Congress—"can have no *constitutional, legal* or *necessary* existence *within* the United States. At home, even the suspension of the writ of *habeas corpus* by Congress, could only lead to indefinite incarceration of an individual, or individuals, *who, if further punished at all, could only be so through* the ordinary or common law of the land." 5 Exec. Doc., 30 Congress, 1st session, Doc. 59, pp. 50, 52.

This *projet,* apparently so reasonable and so necessary, was, however, never adopted by the administration of Mr. Polk; and we accordingly find the Secretary of War, about the same time, directing General Taylor to release from confinement, and send out of his lines, a notorious murderer, because the Articles of War did not then authorize his trial by a court martial, although he was a soldier. And so the Articles of War remained until the present rebellion, notwithstanding the international laws and usages of war clearly clothed our generals, in the enemy's

country, with the power requisite to punish such offenses by *martial law*. Grotius, De Jure Belli ac Pacis, lib. 3, cap. 8; Vattel's Law of Nations, lib. 3, chap. 8; and Wheaton's Elements of International Law, part 4, chap. 2.

Since the present rebellion began, Congress have enlarged the jurisdiction of courts martial over soldiers, so as to embrace such cases. In the same act, too, they have made the punishments affixed to such crimes by the laws of the state where they may be committed, the measure, in one respect at least, of the punishments to be inflicted by such courts. The act, however, is limited in its operations to soldiers. Hence I infer that it was not intended to extend to citizens; and this upon the long established principle, "*that affirmatives in statutes that introduce new laws do imply a negative of all that is not in the purview.*" Hobart's Rep., p. 298.

It might readily be shown that, upon all the principles of construction and interpretation applicable to constitutional provisions in regard to the right of trial by jury, that they occupy a favored relation to the other provisions of that instrument. In the first place, it stands among the reserved rights of the people. It is, as it were, placed in a Bill of Rights; and is thus entitled to a favorable, or liberal construction, as in favor of liberty, and against the powers granted, which, simply because they are encroachments upon liberty, must be strictly construed. There are no rules better established in our constitutional jurisprudence than these. Besides, amendments must always prevail as against provisions conflicting with them; and the right of trial by jury is secured by amendments to the constitution. If they had not been so named, the mere fact that they were adopted after the constitution, and by equal authority to that by which it was adopted, entitles them to prevail against any provision conflicting with them; for as it is not possible for one Parliament, or Congress, to bind the hands of a subsequent one, so one generation of the people can not bind the next, or even itself, at a subsequent time.

I disagree with the opinion expressed by Mr. Attorney General Cushing, in an opinion which I have already quoted, in which he seems to hold that these provisions in respect to the right of trial by jury, are of but little value on account of the very general terms in which they are expressed. He should have remembered, however, that they were adopted by the framers of the constitution from ancient English laws, and had received a fixed and practical signification and application for ages. Mr. Justice Story was not inclined to regard them as mere "glittering generalities;" for he thus descants upon the rights they secure:

"It seems hardly necessary in this place to expatiate on the antiquity or importance of the trial by jury in criminal cases.

It was from very early times insisted on by our ancestors, in the parent country, as the great bulwark of their civil and political liberties; and watched with an unceasing jealousy and solicitude. The right constitutes one of the fundamental articles of *Magna Charta*, in which it is declared: '*Nullus homo capiatur, nec imprisonetur, aut exulit, aut aliquo modo distruatur, &c.; nisi per legale judicium parium suorum, vel per legem terræ;* no man shall be arrested, nor imprisoned, nor banished, nor deprived of life, &c., but by the judgment of his peers, or by the law of the land.' The judgment of his peers here alluded to, and commonly called, in the quaint language of former times, a trial *per pais*, or trial by the country, is the trial by a jury, who are called the peers of the party accused, being of the like condition and equality in the State. When our more immediate ancestors removed to America, they brought this great privilege with them, as their birthright and inheritance, as a part of that admirable common law which had fenced round and interposed barriers on every side against the approaches of arbitrary power. It is now incorporated into all our State constitutions *as a fundamental right, and the constitution of the United States would have been justly obnoxious to the most conclusive objection, if it had not recognized and confirmed it in the most solemn terms.*

"The great object of a trial by jury in criminal cases is to guard against a spirit of oppression and tyranny on the part of rulers; and against a spirit of violence and vindictiveness on the part of the people. Indeed, it is often more important to guard against the latter than the former. The sympathies of all mankind are enlisted against the revenge and fury of a single despot, and every attempt will be made to screen his victims. But how difficult is it to escape from the vengeance of an indignant people, roused to hatred by unfounded calumnies, or stimulated to cruelty by bitter political enmities, or unmeasured jealousies. The appeal for safety can, under such circumstances, scarcely be made by innocence in any other manner than by the severe control of courts of justice, and by the firm and impartial verdict of a jury sworn to do right; and guided solely by legal evidence, and a sense of duty. In such a course there is a double security against the prejudices of judges who may partake of the wishes and opinions of the government, and against the passions of the multitude, who may demand their victim with a clamorous precipitation. So long, indeed, as this palladium remains sacred and inviolable, the liberties of a free government can not wholly fall. But to give it real efficiency, it must be preserved in its purity and dignity, and not with a view to slight inconveniencies, or imaginary burthens, be put into the hands of those who are incapable of estimating its worth, or are too inert, or too ignorant, or too imbecile to wield its potent armor. Mr. Justice Blackstone, with the warmth and

pride becoming an Englishman, living under its blessed protection, has said: 'A celebrated French writer, who concludes, that because Rome, Sparta and Carthage have lost their liberties, therefore, those of England, in time, must perish, should have recollected that Rome, Sparta and Carthage, at the time their liberties were lost, were strangers to the trial by jury.'

"It is observable that the trial of all crimes is not only to be by jury, but to be held in the state where they are committed. The object of this clause is to secure the party accused from being dragged to a trial in some distant state, away from his friends, and witnesses, and neighborhood, and thus to be subjected to the verdict of mere strangers, who may feel no common sympathy, or who may even cherish animosities or prejudices against him. Besides this, a trial in a distant state or territory might subject the party to the most oppressive expenses, or, perhaps, even to the inability of procuring the proper witnesses to establish his innocence. There is little danger, indeed, that Congress would ever exert their power in such an oppressive and unjustifiable a manner. But, upon a subject so vital to the security of the citizen, it was fit to leave as little as possible to mere discretion. By the Common Law, the trial of all crimes is required to be in the county where they are committed. Nay, it originally carried its jealousy still further, and required that the jury itself should come from the vicinage of the place where the crime was alleged to be committed. This was certainly a precaution, which, however justifiable in an early and barborous state of society, is little commendable in its more advanced stages. It has been justly remarked that, in such cases, to summon a jury, laboring under local prejudices, is laying a snare for their consciences, and though they should have virtue and vigor of mind sufficient to keep them upright, the parties will grow suspicious, and indulge other doubts of the impartiality of the trial. It was doubtless by analogy to this rule of the Common Law, that all criminal trials are required to be in the state where committed. But as crimes may be committed on the high seas, and elsewhere, out of the territorial jurisdiction of a state, it was indispensable that, in such cases, Congress should be enabled to provide a place of trial. Story on the Const., §§ 1778, 1779, 1780, *et seq.*

M. DeTocqueville, in discussing the institution of the jury, gives very great weight to its character as a political institution. In times like these, we may, perhaps, learn something of the value of what we now seem about to lose, even from the words of a foreigner. He says:

"The true sanction of political laws is to be found in penal legislation, and, if that sanction be wanting, the law will sooner or later lose its cogency. *He who punishes infractions of the law, is, therefore, the real master of society.* Now, the institution of

the jury raises the people itself, or, at least, a class of citizens, to the bench of judicial authority. The constitution of the jury consequently invests the people, or a class of citizens, with the direction of society." 1 Democracy in America, p. 309.

Again, he says:

"The jury is pre-eminently a political institution. It must be regarded as one form of the sovereignty of the people. When that sovereignty is repudiated, it must be rejected; or it must be adapted to the laws by which that sovereignty is established. The jury is that portion of the nation to which the execution of the laws is entrusted, as the House of Parliament constitute that part of the nation which makes the laws; and in order that society may be governed with consistency and uniformity, the list of citizens qualified to serve on juries must increase and diminish with the list of electors." *Id.*, 310.

He further says:

"The system of the jury, as it is understood in America, appears to me to be as direct, and as extreme a consequence of the sovereignty of the people as universal suffrage. The institutions are two instruments of equal power, which contribute to the supremacy of the majority. *All the sovereigns who have chosen to govern by their own authority, and to direct society instead of obeying its direction, have destroyed or enfeebled the institution of the jury.* The monarchs of the house of Tudor sent to prison jurors who refused to convict, and Napoleon caused them to be returned by his agents." *Id.*, p. 310.

How much it is to be regretted that any American citizen, and especially one in high position, should allow himself to be driven by the terrible condition of the country, or any other consideration, to disparage the trial by jury in criminal cases; and, in the very teeth of the constitution of his country, publicly express his regret that the jury stands in the way of a system of penal administration, which may be more certain to conform to his own private views of justice; and to hold men to answer "charges of crimes" not "well defined by law." That any cause should have led an American citizen to such conclusions, is, I humbly conceive, one of the very worst signs of these evil times. If our country is to be successful in its present struggle, and if its liberties are destined to survive, the jury, venerable for its antiquity and sacred for its uses, must go with us, in all its vigor, through the red-sea, in the midst of which we are now journeying. To abandon it now is to give up the contest for free government in which we are engaged. We must not, therefore, abandon it in these dark days, and it will follow us again into the light, and long continue to protect and bless us in the possession of a manly freedom, in the happy years to come.

I think it has already been sufficiently shown, that there is, in fact, no power in the general government, nor behind that, in

the society which it represents, to proclaim *martial law* throughout the whole country. It may, perhaps, have a local operation, as a mere fact, resulting from the presence of hostile armies; but, in that case, it will exist without a proclamation as well as with it. Dr. Lieber, whom I have already quoted, and whose works are of the highest possible value on all subjects which he touches, in General Orders, No. 100, 1863, of our War Department, fully sustains this view. He says, or rather the Commander-in-Chief, speaking his words, says: "The presence of a hostile army proclaims its *martial law*." If, therefore, there be no rightful power in the government to proclaim *martial law* over any part of its own territories, where the fact is not already established by events, then Indiana is certainly not under *martial law* to-day, and has never yet been.

If, however, in the consideration of this branch of the subject, you should still hold that the government, or any department thereof, may declare *martial law* without the presence of the fact, then other questions naturally present themselves. Among these, I may be permitted to ask the following:

Has the government of the United States, or any department thereof, declared *martial law* in the state of Indiana?

Who has done it?—the President, or some of his generals?

Has Congress authorized it? Let us examine and see how the fact stands. Has that body taken that great, and, for themselves, as a department of the goverement, it may be, final step. Surely Congress has not turned *felo de se*. On the contrary they have showed great prudence and discretion, as well as regard for the constitution, and our free institutions existing under it; while, at the same time, *they have taken due care that the Republic may suffer no detriment.*

I can not more pointedly and briefly present the action of Congress on this subject than was done in the case of Mr. Dodd; and, therefore, adopt what was then urged upon your consideration:

"By an act approved July 31, 1864, (12 Stat. at Large, p. 284,) conspiracies are defined and the mode of punishment prescribed, namely: by trial in the circuit or district courts of the United States, of the proper circuit or district. Can these parties be tried before any other tribunal? The defendants hold not.

"By the President's proclamation of September 24, 1862, suspending the privilege of the writ of *habeas corpus*, it was ordered, 'that during the existing insurrection, and as a necessary measure for suppressing the same, all rebels and insurgents, their aiders and abettors within the United States, shall be subject to *martial law*, and liable to trial and punishment by court martial or military commission.' Without stopping to enquire whether this proclamation was authorized; and, if so, whether it embraced persons charged with committing a substantive offense,

within a state, not in insurrection, and where the United States courts were in full exercise of their powers, the defendants claim that it has been superceded by the act of Congress of the 3d of March, 1863. [12 Stat. at Large, 755,] relating to the writ of *habeas corpus;* and by the President's proclamation based thereon, of Sept. 15, 1863.

"The first section of this act of 1863, authorizes the President to suspend the writ of *habeas corpus.*

"The second, requires the Secretaries of State and War to report to the judges of the United States circuit and district courts the names of all persons held in military custody by order of the President, in their respective districts; and, if the grand juries of the proper districts fail to find bills, it is made the duty of the judges to have all such persons discharged, on taking the oath of allegiance, and giving bond, if required.

"The third section provides that all persons so held, and not reported, shall be entitled to a discharge in the same manner as is provided in the second section, after a failure, on the part of the proper grand jury, to indict them.

"Here are all the sections of this act which bear on the question; and, it will be seen, that while they contemplate and sanction military arrests, they do not countenance or authorize military trials. On the contrary, they fairly discountenance them.

"The President's proclamation, based on this act, limits the suspension of the *habeas corpus* to persons amenable to military law, or to the Rules and Articles of War. No order is contained in the proclamation in regard to trial, and the inference is irresistable, that the proper courts are left to act under the rules of law upon that subject; and these are too well defined to require comment. Civil courts try offenses against the law, committed by citizens—military courts try such as are subject to the Rules and Articles of War; and the defendants claim that they do not fall within that class."

I have been able to find no other act of Congress, passed since the 3d of March, 1863, which authorizes or countenances in any manner whatever the notion that it has, at any time, been the intention of that body to establish *martial law,* or to authorize any one else to do so, or even to permit it. This act does, indeed, authorize the suspension of the writ of *habeas corpus,* if Congress can transfer the discretion conferred upon them by the constitution, to determine at what time, in the progress of an invasion, or rebellion, the emergency required has arisen, when the public safety requires its suspension. That Congress can do any such thing, I deny; but do not choose to stop here to discuss the point, as it is not involved in this cause.

If we admit, for the sake of argument, that Congress have invested the President with the power both to judge and to act in the proper emergency; and that he has well availed himself

of this power by publishing his proclamation of September 15, 1863, what follows? Certainly not, that Congress have proclaimed, or authorized him to proclaim *martial law;* but have, on the other hand, by a controlling implication, provided that *martial law*, so far as the trial of a citizen is concerned, shall not be tolerated; but that such citizen shall, in all cases, when under military arrest, be turned over to the proper civil tribunals—the circuit or district courts, of the proper district, for trial according to law; or discharged either absolutely or conditionally, if no bill of indictment be found against him. And this harmonizes well with what Col. Scott, in his Military Dictionary, lays down as the consequence of a declaration or proclamation of *martial law* within the United States. He says:

"Within the United States, therefore, the effect of a declaration of *martial law* would not be to subject citizens to trial by courts-martial; but it would involve simply the suspension of the writ of *habeas corpus*, under the authority given in the second clause of section nine of the constitution, viz: 'The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in case of rebellion or invasion, the public safety may require it.'

* * * * * * * * *

"The suspension of this privilege would enable the commander to incarcerate all dangerous citizens; but, when brought to trial, the citizen would necessarily come before the ordinary civil courts of the land." Military Dictionary, tit. *Martial Law.*

And such would seem to be the opinion of Mr. Attorney General Cushing, who says:

"I say we are without law on the subject."

"The constitution, it is true, empowers Congress to declare war, to raise and support armies, to provide and maintain a navy, to make rules for the government of the land and naval forces, to provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions, and to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States. But none of these powers has been exerted in the solution of the present question.

"In the amendments of the constitution, among the provisions of general right which they contain, are some, the observance of which seems incompatible with the existence of *martial law*, or, indeed, any other of the supposable, if not necessary incidents of invasion or insurrection. But these provisions are not sufficiently definite to be of practical application to the subject matter.

"In the constitution there is one clause of more apparent relevancy, namely, the declaration that 'the privilege of the writ

of *habeas corpus* shall not be suspended, unless, when in case of rebellion, or invasion, the public safety may require it.' This negation of power follows the enumeration of the powers of Congress, but it is general in its terms; it is in the section of things denied, not only to Congress, but to the federal government as a government, and to the States. I think it must be considered as a negation reaching all the functionaries, legislative or executive, civil or military, supreme or subordinate, of the federal government: that is to say, that there can be no valid suspension of the writ of *habeas corpus* under the jurisdiction of the United States, unless when the public safety may require it, in cases of rebellion or invasion. And the opinion is expressed by the commentators on the constitution, that the right to supend the writ of *habeas corpus;* and, also, that of judging when the exigency has arisen, belong exclusively to Congress. Story's Comm., § 1342; 1 Tucker's Blackstone, p. 292.

"In this particular, as in many others, the constitution has provided for a secondary incident, or a single fact, without providing for the substance, or for the general fact; just as when it gives power to establish post-roads, but says nothing of the transportation of the mails. It does not say that *martial law* shall not exist, unless when the public safety may require it, in case of insurrection or iavasion; but only that the writ of *habeas corpus* shall not be suspended, except in such circumstances. But, if the emergency of insurrection or invasion, involving the public safety, be requisite to justify the suspension of the writ of *habeas corpus*, surely that emergency must be not the less an essential prerequisite of the proclan.ation of *martial law*, and of its constitutional existence.

"We have in Great Britain several recent examples of acts to give constitutional existence to the fact of *martial law*. One is the act of Parliament of the 3 and 4 Geo. 4, ch. 4, designed for the more effectual suppression of local disturbances in Ireland. Another act of that same nature, that of 57 Geo. 3, ch. 3, was for the case of apprehended insurrection 'in the metropolis, and in many other parts of Great Britain,' which act was followed the next year by the indemnifying act of 58 Geo. 3, ch. 6. These examples show, that in the opinion of the statesmen of that country, the general fact of the existence of *martial law*, and its incident, the suspension of the writ of *habeas corpus*, alike require the exercise of the power of the supreme legislative authority. (1 Blacks. Comm., p. 136, Coleridge's note; Bowyer's Const. Law, p. 424.)

"That idea pervades the constitutional organization of the several States of the union. Thus, in Massachusetts it is provided that the writ of *habeas corpus* 'shall not be suspended by the Legislature, except upon the most urgent necessity, and press-

ing occasions, and for a limited time.' In other states, while the exigency for the suspension of the writ is defined, as in New York, the suspending authority is not specified. In others, there is express general provision, as to the suspension of laws, without specifying this writ--the general power of suspension being confided to the legislature, as in Maryland, Virginia and Tennessee. The State of Pennsylvania has both provisions in its constitution. And, it may be assumed, as a general doctrine of constitutional jurisprudence in all the United States, that *the power to suspend laws, whether those granting the writ of habeas corpus, or any other, is vested exclusively in the legislature of the particular State.*

"How intimate the relation is, or may be, between the proclamation of *martial law* and the suspension of the writ of *habeas corpus*, is evinced by the particular facts of the case before me—it appearing, as well by the report of the Governor as by that of Chief Justice Lander, that the very object for which *martial law* was proclaimed was to prevent the use of the writ in behalf of certain persons held in confinement by the military authority, on the charge of treasonable intercourse with hostile Indians. That, however, is but one of the consequences of *martial law*, and by no means the largest or gravest of those consequences, since, according to every definition of *martial law*, it suspends, for the time being, all the laws of the land, and substitutes, in their place no law, that is, the mere will of the military commander.

"There may undoubtedly be, and have been, emergencies of necessity, capable of themselves to produce, and, therefore, to justify such supension of law; and involving, for the time, the omnipotence of military power. But such a necessity is not in the range of mere legal questions. When *martial law* is proclaimed, under circumstances of assumed necessity, *the proclamation must be regarded as the statement of an existing fact, rather than the legal creation of that fact.* In a beleaguered city, for instance, the state of siege lawfully exists, because the city is beleagured; and the proclamation of *martial law*, in such case, is but notice, and authentication of a fact, that civil authority has become suspended, of itself, by the force of circumstances; and that, by the same force of circumstances, the military power has had devolved upon it, without having authoritatively assumed, the supreme control of affairs, in the care of the public safety and conservation. Such, it would seem, is the true explanation of the proclamation of *martial law* at New Orleans by General Jackson." 8 Opinions Atty's Gens. of U. S. *supra.*

Now, this whole opinion establishes, I think, beyond successful controversy, three points, namely:

1. That an act of Congress is necessary to a suspension of the writ of *habeas corpus;*

2. That the suspension of that writ is embraced in a proclamation of *martial law* as one of the incidents thereof; and,

3. That, *a fortiori*, an act of Congress is necessary to authorize a proclamation of *martial law*.

We are thus, again, on solid footing; for, in all cases where a proclamation of *martial law* is necessary, Congress must act—must authorize it before it can properly issue. Hence, *martial law* can only be declared by act of Congress directly; or by act of Congress conferring authority on some other department or officer of the government to make such proclamation. The measure, in either case, must proceed from Congress.

But a brief examination of the acts of Congress, passed since the commencement of the current rebellion, will satisfy you that Congress has not interfered in this matter either by direct or indirect means, except, as already noticed, to deny any such power to the President or those under him. If, therefore, *martial law* must, in any case, be brought in by an authoritative declaration, proclamation, or other public act, before it can properly exist, then, no such declaration or proclamation has yet been made, or act done; and for the best of all possible reasons, namely: Congress has not authorized any such declaration or proclamation to be made, or act to be done, and it can not, on our present hypothesis, be done without such authority.

I believe the Judge-Advocate will find it exceedingly difficult to turn to any act of Congress conferring any such authority. The act of the 3d of March, 1863, is at war with any such authority; for why should Congress authorize the suspension of the writ of *habeas corpus*, if they intended to confer the greater power to declare *martial law?* Above all, why should they prescribe terms upon which military prisoners, *not of war*, should have a trial in the ordinary courts of the land, and, in case of a failure to indict them, should be allowed *habeas corpus* for their discharge? All this is quite opposed to any disposition, on the part of Congress, to confer any such authority; and, indeed, is quite at war with any act done by the President, before the passage of that act, either for the suspension of the writ of *habeas corpus*, or the establishment of *martial law*.

But suppose that, although you should hold, as I conceive you must, that the President can not suspend the writ of *habeas corpus* without an act of Congress authorizing him to do so, you should yet maintain that he can without any act of Congress exercise the all embracing power of establishing *martial law* all over the country, then the question arises:

Has he established *martial law?*

We have been told that the President established *martial law* by his proclamation of September 24, 1862, which has been held up here, as the solid basis of your authority to sit in judgment on the lives of the citizens of Indiana, who are not in the military

or naval service of the United States, and have not been, if ever, for many years. But this proclamation is co-extensive with the territories of the United States; and, if in force any where, it must be everywhere throughout the country. In this view, it is here, and suspends the civil laws and institutions of this State; and of all other States of the Union. Is such a supposition consistent with facts? Can it be reconciled with the subsequent action of the President himself? It is, on the contrary, directly contradicted by the acts both of Congress and the President. Thus, the act of Congress of March 3, 1863, six months subsequent to the proclamation, authorizes the President to suspend the writ of *habeas corpus*, but provides for a report of his military prisoners, not of war, to the proper courts at every term, and for their trial therein if indicted; but, if not indicted, then for their discharge, provided they have been imprisoned twenty days. These provisions are wholly incompatible with the force and effect of every part of the proclamation of September 24, 1862; and no less with the notion that *martial law* had actually been proclaimed and was in force, than with the notion that it should, in the future be proclaimed, or exist in future in any place where the fact of war had not suspended the civil law, and closed the civil courts.

Yet what do we find? The President approved this act, and subsequently acted under it as the law of the land; and, of course, as the true exposition of the constitution in respect to his power over the subjects it embraced. It is a plain expression, on the part of Congress, and of the President, that the writ of *habeas corpus* can only be suspended by law; and that imprisonment of citizens by order of the President, or his inferiors, shall hereafter have a limit entirely independent of his will. Every Circuit and District Court, within its jurisdiction, is to be, under this act, a *jail delivery* to the military prisons of all persons, like the defendants, either by trial, or discharge without trial. I may repeat here the rule of interpretation applicable to statutes which bring in new remedies, namely: What is affirmed in such acts of one thing, is denied of all others. (Hobart, *supra.*) Then, as the civil courts are, by this act, expressly given jurisdiction of these cases, either to try, or, if no indictment be found, to discharge the prisoners, it follows that the jurisdiction of them is denied to military courts or commissions.

The President accepted the act of March 3d, 1863, as the negative of his proclamation of September 24th, 1862. Otherwise, why did he afterwards issue another proclamation to suspend the writ of *habeas corpus?* If the former proclamation was valid, that writ was already suspended; and his second, could add nothing to the force of the first. But the first proclamation contained a declaration of *martial law.* Now, if this was valid, it carried along with it, as its inseparable incident, the suspen-

sion of the writ of *habeas corpus;* and, if it is still in force, then the act of Congress authorizing a subsequent suspension thereof, and the proclamation to carry the same into effect, issued on the 15th of September, 1863, both proceed on a false basis; for it is taken for granted, in both these measures, that the writ of *habeas corpus* was not, at the date of either of them, suspended, which could not have been the case, had either Congress or the President regarded *martial law* as then in force; for *martial law* as already defined, always carries with it the suspension of the writ of *habeas corpus.* In his proclamation of September 15th, 1863, the President makes no allusion to *martial law,* manifestly intending to leave it just where the act of Congress had left it. This silence on the subject in the last proclamation clearly shows that the President, at its date, regarded himself as restrained by the act of Congress, to the suspension of the writ of *habeas corpus;* and did not design to transcend the authority thereof, by a declaration of *martial law.*

But there is a still later act of the President's, that, in my opinion, utterly overthrows all pretense that *martial law* is now in force in the State of Indiana. The act to which I refer is the following proclamation:

"WHEREAS, By a proclamation which was issued on the 15th day of April, 1861, the President of the United States announced and declared that the laws of the United States had been for some time past, and then were, opposed, and the execution thereof obstructed, in certain States therein mentioned, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by law;

"AND WHEREAS, Immediately after the issuing of the said proclamation, the land and naval forces of the United States were put into activity to suppress the said insurrection and rebellion;

"AND WHEREAS, The Congress of the United States, by an act approved on the 3d day of March, 1863, did enact that during the said rebellion the President of the United States, whenever in his judgment the public safety may require it, is authorized to suspend the privilege of the writ of *habeas corpus* in any case throughout the United States, or any part thereof;

"AND WHEREAS, The said insurrection and rebellion still continue, endangering the existence of the constitution and government of the United States;

"AND WHEREAS, The military forces of the United States are now actively engaged in suppressing the said insurrection and rebellion in various parts of the States where the said rebellion has been successful in obstructing the laws and public authorities, especially in the States of Virginia and Georgia;

"AND WHEREAS, On the 15th day of September last, the Presi-

dent of the United States duly issued his proclamation, wherein he declared that the privilege of the writ of *habeas corpus* should be suspended throughout the United States in the cases where, by the authority of the President of the United States, military, naval, and civil officers of the United States, or any of them, hold persons under their command or in their custody, either as prisoners of war, spies, or aiders and abettors of the enemy, or officers, soldiers, or seamen enrolled, or drafted, or mustered, or enlisted in, or belonging to, the land or naval forces of the United States, or as deserters therefrom, or otherwise amenable to military law, or the rules and articles of war, or the rules or regulations prescribed for the military or naval services by authority of the President of the United States, or for resisting a draft, or for any other offence against the military or naval service;

"AND WHEREAS, Many citizens of the State of Kentucky have joined the forces of the insurgents, and such insurgents have on several occasions entered the said State of Kentucky in large force, and not without aid and comfort furnished by disaffected and disloyal citizens of the United States residing therein, have not only greatly disturbed the public peace, but have overborne the civil authorities and made flagrant civil war, destroying property and life in various parts of that State;

"AND WHEREAS, It has been made known to the President of the United States by the officers commanding the national armies, that combinations have been formed in the State of Kentucky with a purpose of inciting rebel forces to renew the said operations of civil war within the said State, and thereby to embarrass the United States armies now operating in the said States of Virginia and Georgia, and even to endanger their safety:

"Now, therefore, I, ABRAHAM LINCOLN, President of the United States, by virtue of the authority vested in me by the constitution and laws, do hereby declare that, in my judgment, the public safety especially requires that the suspension of the writ of *habeas corpus*, so proclaimed in the said proclamation of the 15th of September, 1863, be made effectual and be duly enforced in and throughout the said State of Kentucky, *and that martial law be for the present established therein.* I do, therefore, hereby require of the military officers in the said State that the privileges of the writ of *habeas corpus* be effectually suspended within the said State, according to the aforesaid proclamation, and *that martial law be established therein, to take effect from the date of this proclamation, the said suspension and establishment of martial law to continue until this proclamation shall be revoked or modified,* but not beyond the period when the said rebellion shall have been suppressed or come to an end. And I do hereby require and command, as well all military officers as all civil officers and authorities existing or found within the said State of Kentucky,

to take notice of this proclamation, and to give full effect to the same.

"The *martial law* herein proclaimed, and the things in that respect herein ordered, will not been deemed or taken to interfere with the holding of lawful elections, or with the proceedings of the constitutional Legislature of Kentucky, or with the administration of justice in the courts of law existing therein, between citizens of the United States in suits or proceedings which do not affect the military operations or the constituted authorities of the government of the United States.

"In testimony whereof, I have hereunto set my hand, and caused the seal of the United States to be affixed.

"Done in the city of Washington, this fifth day of July, in the year of our Lord one thousand eight hundred and [L. S.] sixty-four, and of the Independence of the United States the eighty-ninth.

"ABRAHAM LINCOLN.

"By the President:

"WILLIAM H. SEWARD, Secretary of State."

Now, I respectfully submit: Why should the President deem it necessary to proclaim *martial law* in Kentucky, if *martial law* was already in force by a standing, valid proclamation, not only in that State, but all over the Union? The question crushes the supposition. But the recitals of the last proclamation are equally destructive of it; and the special terms of the declaratory portion of the instrument go to the same end. Thus, it is declared that "*martial law* be, for the present, established therein,"—that is, in the State of Kentucky. But according to the theory of the Judge-Advocate, *martial law* had already been established therein two years almost, prior to this proclamation; and in every other State of the Union. The President goes still further to overthrow the theory on which alone, you can entertain jurisdiction of this cause; for he says, that the *martial law* "established" in Kentucky, by that proclamation, shall "take effect from the date" thereof, namely: the 5th of July, 1864. What nonsense is this proclamation if the Judge-Advocate is right in his assumption that the proclamation of September 24th, 1862, had already established *martial law* throughout the Union? If the President, on the other hand, is right, what nonsense is the assumption, that *martial law* is in force in this State? The President had reasons for his discrimination against Kentucky; for he recites them. But it is quite unnecessary to go into them. That he did discriminate against her is enough to answer my purpose; and to place Indiana before you in a different condition from that which she occupies in relation to *martial law*. Indiana is not yet touched with the curse of *martial law*. Kentucky is. I recur to the old rule of construc-

tion, and ask you to apply it to this proclamation. *The expression of one excludes the rest*—of Kentucky, Indiana.

Then, there is no existence of *martial law* in Indiana; for I will not enter again upon the question, whether the order convening this Commission, and the other ordering the accused before it for trial, establish *martial law*. It was not convened until these men were imprisoned for the offences for which they are now on trial. These offences must, of course, have been committed, if ever, before they were arrested. Then, on this hypothesis, you are convened to try them for offences against *martial law*, which had not been proclaimed, and did not exist until after their arrest!

Suppose, however, that there has at any time existed an intention, on the part of the President, or of the General commanding this district, to declare *martial law*, what have they, or either of them, done, to give vitality to such intention, or to establish it as a practical measure of public administration? What rules have they laid down to govern your action in its application? What crimes have they said shall be punished by it? And how shall they be punished?

No general in the world, in the present age, or, indeed, in any age, since the dawn of civilization, has ever yet thought of establishing a *martial law*, the penalties whereof should be confined to his own breast, and that of his judges, until the moment they should fall with ruin and destruction upon its miserable subjects. God forbid that we should live to see such a system put into operation here! All writers on the subject agree that there must always be some notification of what the commanding general intends may be done, and what, not done, by the people under his sway, when he proclaims *martial law*. But has any such notification gone before these proceedings? Truly, I should like to know where we are, and what we are about. Who has defined the offences you are to punish? What is to be the rule and measure of your punishments? You are to select, I suppose, definitions and penalties at pleasure, from the boundless range of unlimited power; for, if *martial law* has been proclaimed, and is in force, all the laws of the land are suspended as to the accused, and to you, and to all. You are under no obligation to go to them, either for definitions or penalties, unless they have been adopted by the military power. But that power has adopted nothing, ordained nothing, defined nothing, in a word, has given us no definitions of offences, and no measures of punishment.

It was not thus that Wellington administered *martial law;* for he declares that the commanding general is—mark the words—"bound to lay down distinctly the *rules*, and *regulations*, and *limits*, according to which his will"—which is *martial law*—"is to be carried out." Hough's Precedents in Mil. Law, p. 514.

And so our own illustrious military chieftain, Lieutenant-General Scott, when he proclaimed *martial law* in Mexico, and enforced it, prescribed rules for its administration. Let me show you how *he* proceeded in the matter. He did not surprise the people of Mexico, though they were aliens and enemies, by announcing the advent of *martial law*, in the first instance, by arrests and trials. On the contrary, he published a general order, in which, among other things, he said:

"1. It is still to be apprehended that many grave offenses not provided for in the act of Congress 'establishing rules and articles for the government of the armies of the United States,' approved April 10, 1806, may be again committed—by, or upon, individuals of those armies, in Mexico, pending the existing war between the two republics. Allusion is here made to offenses, any one of which, if committed within the United States or their organized Territories, would, of course, be tried and severely punished by the ordinary civil courts of the land.

"2. Assassination, murder, poisoning, rape, or the attempt to commit either; malicious stabbing or maiming; malicious assault and battery; robbery; theft; the wanton desecration of churches, cemeteries, or other religious edifices and fixtures; the interruption of religious ceremonies; and the destruction, except by order of a superior officer, of public or private property, are such offenses."

Then, after going on and reciting the absence of any provision for the government of an army and people situated, as were the army of the United States and the people of Mexico, to each other, in our military code; and the necessity of such provision, and that it was found in *martial law* as a matter of necessity, he proceeded to order:

"8. From the same supreme necessity *martial law* is hereby declared as a supplementary code, in and about all cities, towns, camps, posts, hospitals, and other places, which may be occupied by any part of the forces of the United States in Mexico, and in and about all columns, escorts, convoys, guards and detachments of the said forces, while engaged in prosecuting the existing war in and against the said republic, and while remaining within the same.

"9. Accordingly every crime enumerated in paragraph No. 2 above, whether committed:—1. By an inhabitant of Mexico, sojourner or traveler therein, upon the person or property of any individual of the United States' forces, retainer, or follower of the same. 2. By any individual of the said forces, retainer or follower of the same, upon the person or property of any inhabitant of Mexico, sojourner or traveler therein; or, 3. By any individual of the said forces, retainer or follower of the same, upon the person or property of any other individual of the said forces, retainer or follower of the same, shall be duly tried and punished under the said supplementary code.

"10. For this purpose it is ordered that all offenders in the matters aforesaid shall be promptly seized, confined, and reported for trial, before *military commissions*, to be duly appointed, as follows:

"11. Every military commission, under this order, will be appointed, governed and limited, as nearly as practicable, as prescribed by the 65th, 66th, 67th, and 97th of the said Rules and Articles of War, and the proceedings of such commissions will be duly recorded in writing, reviewed, revised, disapproved or approved, and the sentences executed; all, as near as may be, as in the cases of the proceedings and sentences of courts-martial; *provided*, that no military commission shall try any case clearly cognizable by any courts-martial; and *provided*, also, that no sentence of a military commission shall be put in execution against any individual belonging to this army; which may not be, according to the nature and degree of the offense, as established by evidence, in conformity with known punishments, in like cases, in some one of the States of the United States of America."

The order covers many more topics, and presents a concise but masterly system for the administration of *martial law*, well worthy of the consideration of those who may be placed under a similar necessity to that which called it forth. It is manifestly the same which, nearly a year before its date, had been presented to the Secretary of War, and which for some reason or other, that functionary had rejected, as I have already shown. The whole order will be found in Scott's Mil. Dic., art. *Martial Law*, p. 382.

Now, this order made all plain both for the army and the people; and, indeed, for the commissions sitting under it. There was certainty as to the crimes punishable; and, as far as practicable, as to the penalties to be inflicted. There could be no great surprises in either. But how is it here, to-day? Are we not left quite out at sea? And are we not thus left without compass, or chart, or guiding star? If such things be permitted, where will they end? I will not pause to picture the wreck that surely awaits us, if we allow ourselves thus to drift on, over the pathless ocean that lies before us. I have no heart to think of it.

You will not, therefore, entertain jurisdiction of this cause. I am sure you will not; for I can not see where such jurisdiction can begin, on what principles it can rest, or how it can be justified. You *will not*, I beg leave to repeat, entertain jurisdiction, because—

1. Such a jurisdiction is at war with the principles of constitutional liberty as derived by us from Great Britain, and embodied in the federal constitution;

2. Such a jurisdiction is at war with all the liberal principles

of the good old laws of Father-land, which our ancestors brought over with them, as their best birth-right, to the wilds of America;

3. Such a jurisdiction is at war with all the inspiring facts of our early history; and renders worse than useless the noble examples of the men of 1776;

4. Such a jurisdiction is at war with the very nature of a limited constitutional government; and strikes it dead as soon as we permit it to cross our national threshhold;

5. Such a jurisdiction nullifies the acts of Congress as well as the Constitution;

6. Such a jurisdiction, in Indiana, is at war with the proclamations of the President; and would make him the author of the most absurd and monstrous folly, as well as of the grossest injustice;

7. Such a jurisdiction outrages the facts of our condition—our courts, both Federal and State, being open—and the laws of the land having therein free course and full power.

In order to sustain such a jurisdiction *you* must take the responsibility; for the general commanding has issued no order taking it upon himself; and the President is still more distant and disinclined to assume it. Why should you volunteer to do this thing? And why should you now take a step that may, in the future, be referred to as a precedent for the abolition of our liberties?

Under the administration of good honest men, almost anything evil, in the way of precedent, may remain harmless. They will not use it; or, if they do, suffer it to die with the evil exigency that called it forth. But if you now go on with this business, may there not come a time, when the land shall mourn for its lost freedom—lost through the evil example of this hour? Then shall our children curse the evil day in which the bad precedent—a fatal departure from law and right—was left by us for their ruin.

Mr. President and gentlemen, I have done. I know you have each defended our common country in the field; and, had it been your lot, would have cheerfully and nobly died to preserve its liberty and constitution from overthrow or harm. To-day, you have a greater duty to perform—a far more difficult one also. Perform it according to the constitution and laws—according to justice and good conscience, as I trust you will, and posterity, more indebted to this day's work than to all the military achievements of the war in which we are now engaged, will rise up and call you blessed.